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IN THE

Supreme Court of the United States

October Term, 1973

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

VANTAGE STEAMSHIP CORPORATION; SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC, GULF, LAKES AND INLAND WATERS DISTRICT; SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA,

Intervenors.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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STATUTE:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 29 U.S.C, Sec. 151, *et seq.*):

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, National Maritime Union of America, AFL-CIO, respectfully prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Second Circuit, filed November 12, 1973, enforcing an order of the National Labor Relations Board dated May 16, 1972, as corrected by orders dated May 22, 1972 and August 31, 1972, in the case docketed before the National Labor Relations Board as No. 2-CE-44.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit dated October 10, 1973, is reported at 486 F.2d 907, and is printed in the Appendix hereto (3a). The Decision and Order of the National Labor Relations Board, including the opinion of Trial Examiner Thomas A. Ricci, dated May 16, 1972 is reported at 196 NLRB No. 166, and is printed in the Appendix hereto (16a). Orders of the National Labor Relations Board dated May 22, 1972 and August 31, 1972, correcting the Order of May 16, 1972 are printed in the Appendix hereto (46a, 48a). Prior related proceedings are reported as follows: Opinion of the United States District Court for the Southern District of New York reported at 329 F. Supp. 151 (S.D.N.Y. 1971). Opinion of the United States Court of Appeals for the Second Circuit reported at 457 F.2d 1127.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on November 12, 1972 and is printed in the Appendix hereto (1a). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

Questions Presented

1. Where a provision in a union's collective bargaining agreement sought to preserve the jobs and job opportunities of all employees in the union's bargaining unit, was it not error for the National Labor Relations Board and the court below to hold that Section 8(e) of the National Labor Relations Act restricted the union's right to seek job preservation to a unit of employees that was smaller than the union's actual bargaining unit?

2. Where a union has negotiated an industry-wide contract, with an industry-wide pension plan and hiring on an industry-wide basis through common hiring halls, may not the union seek to preserve the stability of its pension plan and the job opportunities of the employees it represents by obtaining an agreement from the employers with whom it has contracted that, during the term of the contract, the employers will not transfer jobs outside the industry-wide group that signed the contract?

3. Is a provision in a collective bargaining agreement which seeks to prevent the transfer of jobs outside the bargaining unit represented by the union prohibited by Section 8(e) of the National Labor Relations Act.

Statutory Provision Involved

Section 8(e) of the National Labor Relations Act, as amended, 73 Stat. 544, 29 U.S.C.A. § 158(e):

> "(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided,* That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further,*

That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms 'any employer', 'any person engaged in commerce or any industry affecting commerce', and 'any person' when used in relation to the terms 'any other producer, processor, or manufacturer', 'any other employer', or 'any other person' shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further,* That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception."

Statement of the Case

In June of 1969, the National Maritime Union of America, AFL-CIO (hereafter "NMU"), petitioner herein, extended its collective bargaining agreements with various operators of deep sea ocean going vessels. The new contract was for a period of three years and represented the product of extensive negotiations designed to bring to the NMU segment of the maritime industry a substantial degree of stability in employment, and most important, stability to the NMU Pension Plan which would suffer impairment if employment by the contract employers were to substantially decline. The latter possibility was of great concern to the NMU in the 1969 negotiations because contributions to the pension plan were geared to the level of employment by the employers signing the contract. To meet this possibility of a detrimental effect on the pension plan should there be a decline in employment by the NMU contract employers the NMU was successful in negotiating a provision, which subsequently became Article 1, Section 2 of the 1969 contract, that if, during the life of the contract, an NMU contract employer sought to transfer a vessel to an employer who was not subject to the NMU contract, and therefore not making contributions to the NMU Pension Plan, a condition of the transfer would be that the transferee employer would recognize the NMU contract as remaining applicable to the particular vessel involved,[1] continue hiring crew members for the vessel from the same pool of employees as the transferring em-

[1] Article 1, Section 2 provided:

"Sale and Transfer of Vessels. (a) The company agrees with respect to any vessel which is presently under or may hereafter come under this Agreement that if during the term of this Agreement said vessel is sold or transferred in any manner to any other business entity not covered by this Agreement for operation under United States flag (but not including a

ployer,[2] and continue making contributions for those employees to the NMU Pension Plan. In this manner the level of employment for NMU seamen and the level of contributions to the NMU Pension Plan would remain relatively constant for the life of the contract. It is the NMU's efforts to enforce this contract provision that has led to the instant litigation.

One of the employers who signed the 1969 NMU collective bargaining agreement was Commerce Tankers Corporation (hereafter "Commerce"). At the time Commerce was operating two ocean going tankers, the S.S. "Barbara" and the S.S. "Thalia". Early in 1970 Commerce sold the S.S. "Thalia" to another NMU contract company and,

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vessel which the Company bareboat charters and the charter is terminated), said vessel shall be sold or transferred with the complement of employees who either are or shall be provided by the Union in accordance with the terms of this Agreement, or such number as may be agreed upon between the Union and the transferee. The term 'transfer' shall be construed to include any chartering of a vessel by the Company.

"(b) The Company obligates itself to obtain for the benefit of the Union a written undertaking with the Union to be executed by the business entity to which the vessel has been sold or transferred that for the full term of the Agreement all of its terms and provisions shall apply to said vessel except as hereinabove provided and that said business entity will fully comply with all of the terms and provisions of this Agreement and any amendments thereto to preserve the jobs and job rights of the Unlicensed Personnel covered by this Agreement and to protect and maintain the wages, pension rights and other economic benefits and working conditions provided such personnel under this Agreement."

[2] In the maritime industry virtually all hiring is through union operated hiring halls. The NMU collective bargaining agreement contains provisions for a hiring hall under which the employers agree to hire all their unlicensed seamen through the NMU hiring halls. The collective bargaining agreement also contains provisions establishing the seniority bases on which employees are eligible for employment, including whether they are entitled to permanent, as distinguished from relief, jobs.

since the NMU contract remained applicable to the vessel, no difficulty ensued. However, in December of 1970, Commerce entered into a contract with Vantage Steamship Corporation (hereafter "Vantage"), the charging party and one of the intervenors in the court below, under which it agreed to sell the S.S. "Barbara" to Vantage. NMU was not notified in advance by Commerce of this agreement with Vantage, and the contract did not contain any provision requiring Vantage to comply with the NMU collective bargaining agreement.

Early in January of 1971 NMU learned of the contemplated sale of the "Barbara" to Vantage. By letter dated January 11, 1971, NMU wrote to Commerce reminding it of its obligations under Article 1, Section 2 of the collective bargaining agreement. Commerce replied by letter dated January 13, 1971, confirming the existence of the agreement with Vantage, and stating that it was aware of its contractual obligations and that there was "no reason to believe" that they would not be fulfilled.

As it turned out, there was considerable reason for believing that these contractual obligations would not be fulfilled. When NMU attempted to contact Vantage, it was advised that Vantage would not recognize the NMU contract. It became apparent to NMU that Commerce intended to transfer the vessel to Vantage without complying with Article 1, Section 2, and was making contrary representations to NMU in order to mislead NMU into inaction. Accordingly, in order to protect itself, NMU instituted an arbitration proceeding against Commerce under the contract grievance procedure and obtained an order from the arbitrator enjoining Commerce from transferring the S.S. "Barbara" without complying with Article 1, Section 2 of its collective bargaining agreement with NMU.

NMU then brought suit in the District Court to enforce the arbitrator's award, and a preliminary injunction

was entered enjoining Commerce from transferring the "Barbara" without complying with Article 1, Section 2 of the collective bargaining agreement.[3] Vantage then filed unfair labor practice charges with the Regional Director for the National Labor Relations Board, contending, *inter alia*, that the maintaining and enforcing of Article 1, Section 2 of the collective bargaining agreement between NMU and Commerce was in violation of Section 8(e) of the National Labor Relations Act.[4] It is this charge that led to the instant proceeding.

Decisions Below

The Vantage unfair labor practice charge was tried before Trial Examiner Thomas A. Ricci who, on September 2, 1971, filed a decision in which he found that Article 1, Section 2 of the NMU collective bargaining agreement was a valid work preservation provision and recommended dismissal of the charge (25a). The National Labor Relations Board reversed, holding that Article 1, Section 2 was in violation of Section 8(e) of the National Labor Relations Act, as amended (16a).

As viewed by the Board and conceded by all parties, the basic question in determining if there had been a violation of Section 8(e) was whether the Union's objective was preservation of work for *unit* employees, or was to satisfy union objectives elsewhere. The answer to this question, in turn, depended upon the determination of

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[3] *National Maritime Union* v. *Commerce Tankers Corp.*, 325 F. Supp. 360 (S.D.N.Y. 1971), *reversed*, 457 F.2d 1127 (2nd Cir. 1972).

[4] The Regional Director for the Second Region petitioned the District Court for an injunction under Section 10(1) of the Act, 29 U.S.C., Section 160(1). This petition was denied, *McLeod* v. *National Maritime Union*, 329 F. Supp. 151 (S.D.N.Y. 1971), but this denial subsequently was reversed, 457 F.2d 1127 (2nd Cir. 1972).

what was the appropriate unit of employees for which the Union may seek to preserve job opportunities.

NMU contended that the appropriate unit consisted of those employees seeking employment through the NMU hiring halls and who might be referred for employment aboard the S.S. "Barbara". The Board did not reject this contention; instead it declined to decide this crucial issue by stating that it would "assume without deciding" that the unit could include such employees. Said the Board:

> "And we can *assume without deciding* that this single-employer unit could include employees who may in the future be referred from NMU hiring halls to work on ships operated by Commerce." (Emphasis supplied) (20a).

However, after "assuming without deciding" that the unit represented by the NMU could be deemed to include those employees entitled to seek employment through the NMU hiring halls, the Board proceeded to ignore the necessary consequence of this assumption and held that the Union could seek job preservation *only* for those employees actually employed aboard a ship at the time of sale. Thus, the Board performed the unique feat of finding that the whole was *less* than the sum of its parts, for while it held that the unit represented by the Union could consist of all employees entitled to seek employment through the hiring halls, it held that the Union could not seek job preservation for this unit, but, instead, job preservation was restricted to a much smaller group defined as those actually employed aboard a ship at the time of sale.

The Court of Appeals for the Second Circuit granted enforcement of the Board's Order (3a). In so doing, the Court held that the Union's bargaining unit was not the yardstick for measuring the permissible scope of a work preservation clause when that unit was "many

times larger than the actual work force of the primary employer" (15a).

In deciding the case on this basis both the Board and the court below have substantially departed from numerous prior decisions of the Board itself and various Courts of Appeals which have held that the bargaining unit represented by the union was the yardstick for measuring the permissible scope of a work preservation provision. Moreover, the decisions below ignore the significance of the fact that bargaining in the maritime industry is on an industry-wide basis (although it may not meet the technical requirements of multi-employer bargaining) and that the number of employees in the bargaining unit is not many times larger than the combined actual work force of all the employers who hire through the same hiring hall and contribute to the same pension plan. Because virtually all hiring in the maritime industry is through hiring halls, the net effect of the decisions below is to deny unions in the maritime industry any meaningful means for job preservation and for protecting the stability of their pension plans.

Reasons Relied on for Allowance of the Writ

I. The Decision Below Violates The Principle Established By This Court In *National Woodwork Manufacturers Assoc.* v. *NLRB*, 386 U.S. 612 (1967), That A Union May Seek To Protect The Jobs And Job Opportunities Of All Employees In Its Bargaining Unit, And Is Contrary To Numerous Prior Decisions of Various Courts of Appeal And The Board Recognizing A Union's Bargaining Unit As Defining The Scope Of A Permissible Job Preservation Provision.

The only prior decision in which this Court has had occasion to consider the scope and application of Section 8(e) of the Act to work preservation provisions in collective bargaining agreements is *National Woodwork Manufacturers Assoc.* v. *NLRB*, 386 U.S. 612 (1967). In *National Woodworking*, this Court disapproved of the practice on the part of the National Labor Relations Board of giving an expansive interpretation to Section 8(e) of the Act and applying it to situations which Congress did not intend it to cover. The decision in *National Woodworking* called a halt to this expansive application of Section 8(e) by holding that Section 8(e) was enacted solely for the purpose of closing the loop hole in the secondary boycott provisions of the Taft-Hartley Act resulting from the *Sand Door* decision, *United Brotherhood of Carpenters, etc.* v. *NLRB*, 357 U.S. 93 (1958)[5] Relying heavily on Section 8(e)'s legislative history, this Court concluded that Section 8(e) should not be interpreted as being applicable to anything more than the particular situation it was designed to correct, namely, closing the *Sand Door* loophole in the Act. Thus, this Court concluded, 386 U.S. at 635:

> "This loophole-closing measure likewise did not expand the type of conduct which § 8(b) (4) (A)

[5] The *Sand Door* case had held that the secondary boycott provisions adopted as part of the Taft-Hartley Act applied only to coercive conduct by a union and did not preclude a voluntary agreement between a union and an employer not to handle the goods of a neutral employer.

> condemned. Although the language of § 8(e) is sweeping, it closely tracks that of § 8(b) (4) (A), and just as the latter and its successor § 8(b) (4) (B) *did not reach employees' activity to pressure their employer to preserve for themselves work traditionally done by them, § 8(e) does not prohibit agreements made and maintained for that purpose.*" (Emphasis supplied)

Bearing in mind the limited scope of Section 8(e), this Court set the tone for its application as requiring an inquiry into whether the union's objective was the preservation of work for the employees it represented, or "to satisfy union objectives elsewhere", 386 U.S. at 644. "The touchstone is whether the agreement or its maintenance is addressed to labor relations of the contracting employer *vis-a-vis* his own employees." 386 U.S. at 645.

In several cases following *National Woodwork,* the Board and the Courts of Appeal drew a distinction between contract provisions designd to protect unit employees (such provisions dealt with the "labor relations of the contract employer *vis-a-vis* his own employees"), and contract provisions designed to acquire control for the union over jobs and employees it did not represent (agreements calculated to satisfy union objectives "elsewhere"). The threshold test which was developed was whether the provision in question was designed to protect the jobs of "unit" employees, see *International Union United Mine Workers, etc. (Bituminous Coal Operators)* 165 NLRB 467 (1967); *Meat and Highway Drivers, Etc.* v. *NLRB,* 335 F.2d 709 (D.C. Cir. 1964); *Orange Belt District Council* v. *NLRB,* 328 F.2d 534 (D.C. Cir. 1964), it being recognized that Section 8(e) did not condemn as being "secondary" efforts by unions to protect the jobs of those employees in the unit for which it had both the statutory right and duty to bargain.

While other tests were developed, such as whether a contract was a "signatory" contract, or a "union membership" contract, or a "union standards" contract, see *e.g., Local Union No. 636, Etc.* v. *NLRB,* 430 F.2d 906 (D.C. Cir. 1970); *American Boiler Mfgrs. Assoc.* v. *NLRB,* 404 F.2d 556 (8th Cir. 1968); *A. Duie Pyle, Inc.* v. *NLRB,* 383 F.2d 772 (3rd Cir. 1967), *NLRB* v. *Local Union No. 28 Sheet Metal Workers,* 380 F.2d 828 (2nd Cir. 1967); *Kennedy* v. *Sheet Metal Workers Local 108,* 289 F. Supp. 65 (C.D. Calif. 1968); *Kaynard* v. *Local 282, Teamsters Union,* 275 F. Supp. 19 (E.D.N.Y. 1967); *Retail Clerks, Local 1288,* 163 NLRB 817 (1968), these cases did not reject the fundamental principle that the right to job preservation extended to *all* unit employees; rather these other tests were designed as a means for distinguishing between contract provisions which were limited to protecting unit employees, and contract provisions which were designed to extend union control over non-unit employees.

Before the Board and the court below, NMU contended that the bargaining unit it represented consisted of all employees eligible to seek employment through the NMU hiring halls. Since all such employes were eligible to seek employment aboard the vessels operated by Commerce, the Commerce bargaining unit was co-extensive with the industry-wide unit. Neither the Board nor the court below rejected NMU's definition of the bargaining unit.[6] Instead, contrary to all prior decisions, they held that the right to

[6] Although the Board equivocated by stating that it would "assume without deciding" that the Commerce single-employer unit included employees in the hiring hall who might be referred for employment in the future, there really can be no doubt that the Commerce single-employer unit included those eligible to seek employment on Commerce vessels as well as those actually employed aboard ship. This readily becomes apparent from the nature and history of the bargaining relationship involved. Here the important feature is the hiring hall as it operates in the maritime industry. The hiring hall is provided for in the collective bargaining agreement between the union and the employers, which in this case, included

contract for job preservation was limited to a group that was much smaller than the bargaining unit, namely the men actually employed aboard a vessel at the time of sale.

The Board, without citing any supporting authority whatsoever, held that the only unit for which the union could seek job preservation was a unit consisting of those employees who had permanent jobs aboard the ship at the time it was sold, thereby necessarily also holding that the union had no right to seek job preservation for the remaining employees in the unit, namely those eligible to seek

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Commerce. In the contract the employer (Commerce) agrees to procure all its unlicensed personnel through the contract hiring hall. The contract also establishes seniority classifications, bases for rejecting applicants, and similar matters defining the relationship between the employer (Commerce) and the seaman *long before he even applies for employment,* let alone actually is engaged aboard a vessel. Thus in the maritime industry, where virtually all hiring is accomplished through hiring halls, *the unit of employees for which the employer and the union in fact bargain consists of those employees entitled to seek employment through the hiring hall.*

In addition to this being the unit for which the union and the employer do in fact bargain, it is also clear that the union and the employer *have a legal duty* to bargain for this unit. As an example, it requires no citation of authority to recognize that if an applicant for employment through a hiring hall were rejected for employment by an employer in violation of the hiring hall regulations, the union would be under an obligation to handle the employee's grievance. Any argument that the union had no obligation to represent the applicant because he was not an employee of the company at the time and, therefore, not in the bargaining unit, would be quickly rejected, *Local 872 International Longshoremen's Association,* 163 NLRB 586 (1967); *Local 1351, Steamship Clerks, etc., vs. NLRB,* 329 F.2d 259 (D.C. Cir. 1964), *cert. denied,* 377 U.S. 993.

It follows that a collective bargaining agreement which provides for a hiring hall creates a relationship between the employer, the union, and the individuals who seek employment through the hiring hall, which *pre-dates* and is not dependent upon the actual existence of the employer-employee relationship. ***In signing a collective bargaining agreement which provides for recognition of a hiring hall, an employer assumes a contractual obligation to all those entitled to use the hiring hall which brings these individuals within the unit of employees with whom the employer has agreed to bargain.***

employment through the hiring hall. This distinction between permanent and non-permanent employees misses the basic purpose of job preservation clauses, and, if recognized, would invalidate virtually all work preservation provisions. A valid work preservation provision may, and usually does, preserve job opportunities for individuals represented by a union even though they may not actually be employed by the employer at a particular time, and this fact never has been thought to have any bearing on the validity of a work preservation provision. This point can be easily demonstrated.

It is true, of course, that Article 1, Section 2 of the NMU collective bargaining agreement protects the job opportunities of all seamen seeking employment through the NMU hiring halls *vis-a-vis* all the employers under contract to NMU and not just as against Commerce. This is because the hiring hall creates a common pool of employees serving all the contract employers, and the same contractual relationship which exists between a seaman seeking employment through the hiring hall and Commerce also exists between the seaman and all the other contract employers. The fact that this pool of employees available to Commerce is co-extensive with the pool of employees available to the other employers does not make it illegal for the union to seek job preservation for this pool of employees *vis-a-vis* Commerce, or any other individual employer. In *American Federation of Television and Radio Artists (Westinghouse Broadcasting Co., Inc.)*, 160 NLRB No. 24 (1966), the similar argument was made that a work standards provision was illegal because it protected the employees of other employers who have the same work standards. The Board rejected the argument that such an effect, *even if intended,* made the work standards provision illegal, stating:

> ". . . The fact that the Respondent's representative admitted that the Union also desired to protect the wage standards of union members not working for WINS does not, by itself, affect the lawfulness of such conduct. *This is true because whenever a union also represents other units of employees doing the same type of work, its conduct aimed at setting the wage rates and protecting the work of unit employees will necessarily have the additional and incidental effect of protecting the wage standards of such other employees. To find that because of this additional object the Union's conduct is secondary would mean that in most cases it would not be permissible for a union to take action to obtain a 'work-standards' clause.*" (Emphasis supplied)

It is well settled that a contract provision which prohibits an employer from subcontracting out work is a valid work preservation provision, *e.g., Meat and Highway Drivers, etc.* v. *NLRB*, 335 F.2d 709 (D.C. Cir. 1964). Such a provision protects the job opportunities not only of the employees who are working for the employer at a particular time but also protects, *by preserving jobs within the bargaining unit*, those employees who may be hired after them during the term of the contract. Moreover, a company may have men in lay-off status who have seniority with the company and a contract right to be recalled when work becomes available. To the extent that the "no subcontracting" clause retains work within the company which might otherwise be done elsewhere, it enhances the job opportunities of these men in lay-off status. Since the men in lay-off status are not actually employed at the time the contract is signed, they, like the men in the NMU hiring halls waiting for employment, are not permanent employees of the employer, although one can be sure that a large number of employees in lay-off status would be the motivating reason for a union to seek a "no subcontracting" provision in its collective bargaining agreement.[7] These men awaiting employment may not be permanent employees because not actually employed, but economically they are the employees most directly affected by a work preservation provision, and being a part of the Union's bargaining unit, it is the preservation of their job opportunities which makes the union's effort to protect them "primary", as distinguished from "secondary" activity.

The statement by the court below that the bargaining unit is not the yardstick for permissible job preservation when it is many times larger than the actual work force of the primary employer overlooks the fact that this will

[7] Work recapture is clearly the type of primary activity which is not prohibited by Section 8(e), see *Meat and Highway Drivers, etc.* v. *NLRB*, 335 F.2d 709, at 714 (D.C. Cir. 1964).

always be the case where an employer is only one of many employers bargaining on an industry-wide basis and hiring is through a common hiring hall. In such circumstances, the bargaining unit always is larger than the actual work force of any individual employer, but is not larger than the combined work force of all the employers who signed the industry-wide contract. Carried to its logical conclusion, the rationale of the court below would result in invalidating all work preservation clauses in hiring hall industries. More important, as this Court recognized in *National Woodwork*, *supra*, Section 8(e) does not reach union activity designed to preserve work traditionally done by the employees represented by the union. The relative size of the bargaining unit and the number of actual employees has no bearing on basic issue of whether the union is seeking to preserve for its bargaining unit work traditionally done by members of the bargaining unit. It follows that any retreat from the principle that the right to seek job preservation extends to all employees in the bargaining unit would deprive employees of their right, recognized in *National Woodwork*, to seek to preserve for themselves work traditionally done by them.[8]

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[8] The court below also based its decision in part on an alleged anti-SIU motivation on the part of NMU. The Board, however, made no such finding and did not base its decision on such alleged inter-union rivalry. Since the alleged anti-SIU motivation was not the basis of the Board's decision, it was error for the court below to base enforcement of the Board's order on a ground which was not considered by the Board. Moreover, throughout this litigation NMU has denied such anti-SIU motivation in connection with the negotiation of Article 1, Section 2 of the contract, and when this argument was litigated in the District Court on the Regional Director's application for a Section 10(1) injunction, the District Court specifically found that the motivation for the negotiation of Article 1, Section 2 was the NMU's desire to protect its pension plan, and not any anti-SIU motivation, see *McLeod* v. *National Maritime Union*, 359 F. Supp. 151, 157-158 (S.D.N.Y. 1971).

Since the decisions below reject the principle that work preservation clauses may extend to all employees in the bargaining unit, certiorari should be granted so that this error may be corrected and the decisions below reversed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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IN THE

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Intervenors.

APPENDIX

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(APPENDIX)

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 72-2268

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NATIONAL LABOR RELATIONS BOARD,

Petitioner,

and

VANTAGE STEAMSHIP CORPORATION; SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC, GULF, LAKES AND INLAND WATERS DISTRICT; SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA,

Intervenors,

v.

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Respondent.

—o—

Before:

LUMBARD, FRIENDLY and FEINBERG, *Circuit Judges.*

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board for enforcement of a certain order issued by it against Respondent, National Maritime Union of America, AFL-CIO, its officers, agents, and representatives, on May 16, 1972, as corrected by orders on May 22, 1972, and August 31, 1972. The Court heard argument of respective counsel on September 11, 1973, and has considered the briefs and transcript of record

filed in this cause. On October 10, 1973, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's Order. In conformity therewith it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Second Circuit that the said order, as corrected, of the National Labor Relations Board in said proceeding be enforced, and that the Respondent, National Maritime Union of America, AFL-CIO, its officers, agents, and representatives, abide by and perform the directions of the Board in said order contained.

IT IS FURTHER ORDERED AND ADJUDGED by the Court that costs shall be taxed against the Respondent.

/s/ HENRY J. FRIENDLY
Judge, United States Court of Appeals for the Second Circuit

/s/ WILFRED FEINBERG
Judge, United States Court of Appeals for the Second Circuit

Filed: November 12, 1973

A true copy,

A. DANIEL FUSARO,
Clerk

Opinion of Court Below

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 2—September Term, 1973.

(Argued September 11, 1973 Decided October 10, 1973.)

Docket No. 72-2268

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

and

VANTAGE STEAMSHIP CORPORATION; SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC, GULF, LAKES AND INLAND WATERS DISTRICT; SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA,

Intervenors,

against

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Respondent.

Before:

LUMBARD, FRIENDLY and FEINBERG, *Circuit Judges.*

On petition by National Labor Relations Board to enforce order requiring union to cease and desist from seeking to induce company to comply with agreement violating section 8(e) of the National Labor Relations Act.

Petition for enforcement granted.

Opinion of Court Below

FEINBERG, *Circuit Judge:*

For the fourth time in less than two years, the bitter rivalry between two maritime unions gives rise to knotty legal problems in this court. See also McLeod v. National Maritime Union, 457 F.2d 490 (2d Cir. 1972); National Maritime Union v. Commerce Tankers Corp., 457 F.2d 1127 (2d Cir. 1972); NLRB v. National Maritime Union, No. 72-2349 (2d Cir. June 18, 1973), enforcing in open court, National Maritime Union, 198 N.L.R.B. No. 112 (1972). On this occasion, the National Labor Relations Board seeks enforcement of its order holding that the National Maritime Union of America, AFL-CIO (NMU) and Commerce Tankers Corporation violated section 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e), by enforcing a provision in their collective bargaining agreement so as to prevent Commerce from selling one of its vessels to Vantage Steamship Corporation. Commerce Tankers Corp., 196 N.L.R.B. No. 165 (1972). Vantage was and is party to a labor agreement with the Seafarers International Union of North America (SIU). Both Vantage and the SIU, the latter joined by an affiliate, have intervened in this proceeding in support of the Board. For reasons set forth below, we enforce the Board's order.

I

The clause at issue is Article I, section 2 of the 1969 contract between Commerce and the NMU. This section, which is reproduced in the margin,[1] provides in substance

[1] Article I, section 2, which is entitled "Sale and Transfer of Vessels," provides:

(a) The Company agrees with respect to any vessel which is presently under or may hereafter come under this Agreement, that if during the term of this Agreement said vessel is sold or transferred in any manner to any other business entity not

that if Commerce sells a ship to an American flag shipper not already under contract with the NMU, the ship will be sold with a crew provided by the NMU, and Commerce will obtain from the purchaser an undertaking to abide by the NMU contract. At the time of the agreement, Commerce owned two ships and in December 1970 sold one of them, the S.S. Thalia. Since the purchaser was a signatory to the standard NMU contract, no problem of inter-union rivalry arose.

However, later in the same month, Commerce agreed to sell its remaining vessel, the S.S. Barbara, to Vantage, which, together with its subsidiaries, operated a number of vessels whose employees were represented by the SIU. Very soon thereafter, both Commerce and Vantage found themselves caught between the competing demands of the two unions and frantic activity ensued in a variety of forums. Under pressure from the NMU, Commerce asked

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covered by this Agreement for operation under United States flag (but not including a vessel which the Company bareboat charters and the charter is terminated), said vessel shall be sold or transferred with the complement of employees who either are or shall be provided by the Union in accordance with the terms of this Agreement, or such number as may be agreed upon between the Union and the transferee. The term "transfer" shall be construed to include any chartering of a vessel by the Company.

(b) The Company obligates itself to obtain for the benefit of the Union a written undertaking with the Union to be executed by the business entity to which the vessel has been sold or transferred that for the full term of the Agreement all of its terms and provisions shall apply to said vessel except as hereinabove provided and that said business entity will fully comply with all of the terms and provisions of this Agreement and any amendments thereto to preserve the jobs and job rights of the Unlicensed Personnel covered by this Agreement and to protect and maintain the wages, pension rights and other economic benefits and working conditions provided such personnel under this Agreement.

Vantage to give the undertaking required by Article I, section 2. The SIU threatened to strike all the vessels operated by Vantage if it stopped using the SIU hiring hall as the exclusive source of its unlicensed seamen.[2] Vantage understandably refused to accede to the NMU-inspired demand, and threatened to sue Commerce if it did not sell the S.S. Barbara, as it has agreed to do. Similarly, the NMU refused to waive its contractual rights and promptly secured an arbitration award restraining Commerce from delivering the Barbara to Vantage without complying with the ship transfer provisions of the NMU contract. A month later, this award was confirmed and a preliminary injunction in favor of the NMU was issued by the United States District Court for the Southern District of New York. 325 F.Supp. 360.[3] In the interim, Vantage filed a charge with the National Labor Relations Board alleging that both the NMU and Commerce were violating section 8(e) of the Act. In May 1971, also in the Southern District, the Board's Regional Director sought an injunction under section 10(*l*) of the Act, 29 U.S.C. § 160(*l*), on the ground that he had reasonable cause to believe that the NMU and Commerce were violating section 8(e) of the Act. The injunction was denied. 329 F.Supp. 151. Appeals were taken both from this order and from the earlier Southern District order enjoining the sale of the vessel. The appeals were

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[2] Under the NMU contract, of course, Vantage would have to use the NMU hiring hall.

[3] Subsequently, Commerce commenced an arbitration against Vantage to enforce the contract of sale and, in addition, to require compliance with the NMU clause on the basis of an oral promise allegedly made by Vantage. The arbitrators 2-1 found for Commerce. On December 5, 1972, the award was enforced by Judge Gellinoff of the New York Supreme Court in an unreported opinion, and the Appellate Division 3-2 affirmed on the basis of that opinion. Vantage S.S. Corp. v. Commerce Tankers Corp., 41 A.D.2d 813, 342 N.Y.S.2d 281 (1973).

consolidated, and in March 1972 this court reversed both orders. 457 F.2d 1127. Even before issuance of the 10(*l*) injunction, however, the Board proceedings went forward. In September 1971, the Trial Examiner found that the contract clause did not violate section 8(e) because it "is purely a work preservation clause." In May 1972, the full Board unanimously concluded to the contrary,[4] and this petition for enforcement of its order followed.

II

Now that the dust has settled somewhat,[5] the precise legal question before us is simple to state but difficult to decide: Did the NMU violate section 8(e) of the Act by maintaining and enforcing Article I, section 2 (see note 1 supra) of the NMU-Commerce collective bargaining agreement? Section 8(e) makes it an unfair labor practice for a union and an employer

> to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person . . . .

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[4] The Board's decision and order was subsequently amended in May and in August 1972, without changing the result.

[5] Whether the dust has similarly settled on the S.S. Barbara, we do not know. On the prior appeal to this court, Judge Waterman plaintively observed that the legal activity of the parties

> is in marked contrast to the inactivity of the subject of the contract, the tanker *Barbara*, which sits idly in a shipyard in Mobile for the lack of unlicensed seamen to man her.

457 F.2d at 1130.

Opinion of Court Below

Before examining the judicial gloss on section 8(e) most pertinent here, we must note a preliminary problem. In finding a violation of the section in this case, the Board relied on the portion that makes it an unfair labor practice for a union (NMU) and an employer (Commerce) to agree to "cease doing business with any other person" (Vantage). It may at least be doubted whether an isolated sale of a capital item such as a ship comes within this language. It is arguable that such a transaction does not fit either the letter of the statute or the probable congressional purpose. However, although the Board faced the issue squarely and held that sales of ships occurred "in the normal course of doing business in the maritime industry," NMU counsel, at oral argument, expressly disclaimed reliance upon this point. Accordingly, we will assume—without deciding for the future—that in the ship-sale transaction, Commerce and Vantage were "doing business" with each other and that the disruption of the transaction was a cessation of this.

Section 8(e) was enacted in 1959 as part of the Landrum-Griffin amendments to the National Labor Relations Act, which were designed to correct what many employers and members of Congress thought were statutory deficiencies in dealing with secondary boycotts.[6] In Carpenters Local 1976 v. NLRB, 357 U.S. 93, 78 S.Ct. 1011, 2 L.Ed. 2d 1186 (1958) (Sand Door), the Supreme Court had held that an employer's voluntary observance of a clause in his agreement with his employees not to handle nonunion goods was lawful under what was then section 8(b)(4)(A) of the

[6] The statute does not use the phrase "secondary boycott," and many secondary pressures are completely legal, as will be seen below. For a comprehensive, yet surprisingly compact, history of the law regarding secondary activity, see The Developing Labor Law 604-90 (1971) (Supplements 1971 and 1972), a project of the Section of Labor Relations Law of the American Bar Association.

Labor Act. 357 U.S. at 98-99, 78 S.Ct. 1011. Section 8(e) was designed "to plug this gap in the legislation by making the . . . clause itself unlawful." National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 634, 87 S.Ct. 1250, 1263, 18 L.Ed.2d 357 (1967). But section 8(e) like other sections designed to curb secondary activity, does not shimmer with clarity, and it has been a source of much litigation. See The Developing Labor Law, note 6 supra, at 645-74.

The Board held in this case that because Article I, section 2 of the contract prevented Commerce from selling a ship to Vantage, the clause was prohibited as one

> whereby an employer agrees, in substance, to cease or refrain from doing business with any other person within the meaning of Section 8(e) of the Act.

The NMU argues to us, as it did before the Board, that the clause was entirely proper because its objective was to preserve work for its members. Both parties, and the intervenors, support their positions with language from *National Woodwork,* supra, the only section 8(e) case decided by the Supreme Court.

National Woodwork involved a contract provision negotiated by the Carpenters Union under which its members would not "handle" doors which had been "fitted" prior to being furnished on the job. Such precut and prefitted doors could be obtained from manufacturers, but doing so eliminated preparatory work which had been "traditionally performed in the . . . area by the carpenters employed on the jobsite." 386 U.S. at 615-616, 87 S.Ct. at 1253. The Supreme Court held in a 5-4 decision that the contract clause was lawful because it was intended to protect and preserve work customarily performed by employees in the bargaining unit. The Court pointed out that Congress did not intend to obliterate the longstanding distinction between union pressures directed toward "primary" objectives and identical pressures aimed at "secondary" objec-

tives. Id. at 620, 633-635, 87 S.Ct. 1250. According to the Court:

> The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-á-vis* his own employees.

Id. at 645, 87 S.Ct. at 1268. Putting it another way, the test is

> whether, under all the surrounding circumstances, the Union's objective was preservation of work for [the employer's] employees, or whether the agreements . . . were tactically calculated to satisfy union objectives elsewhere.

Id. at 644, 87 S.Ct. at 1268. The Court surmised that such criteria would not always be simple to apply. Id. at 645, 87 S.Ct. 1250. Subsequent cases, cf. Journeymen Plumbers Local 636 v. NLRB, 139 U.S. App. D.C. 165, 430 F.2d 906 (1970); NLRB v. Milk Drivers Local 753, 392 F.2d 845 (7th Cir. 1968); A. Duie Pyle, Inc. v. NLRB, 383 F.2d 772 (3d Cir. 1967), cert. denied, 390 U.S. 905, 88 S.Ct. 819, 19 L.E.d.2d 871 (1968), and this litigation prove the prophecy correct.

The NMU clause here was in a sense aimed at the labor relations of the primary employer, since it required Commerce to provide for continuation of the collective bargaining agreement, if the ship were sold. On the other hand, the clause was also "addressed" to the labor relations of the secondary employer,[7] since it required Vantage to be or to become an NMU employer, to the extent of manning the Barbara. As to whether the clause was calculated to satisfy union objectives "elsewhere," it can fairly be said both that the NMU objective of making sure that the unit remained under the protection of the NMU agreement was

[7] Indeed, as noted above, as a result of the NMU's efforts to enforce the clause, Vantage was confronted with the threat of a strike by the SIU on Vantage's own vessels.

not an objective "elsewhere," and that the union's aim to convert any prospective purchaser to an NMU contract was.

Despite the closeness of these competing arguments, we are persuaded that the Board's decision was correct. While the clause at issue here has aptly been described as introducing "a new twist to Section 8(e) litigation," The Developing Labor Law 107 (1971 Supp.), the established distinction between "union standards" and "union signatory" subcontracting clauses is analogous. The former, which restrict subcontracting to those who observe certain pay scales and conditions of employment, are valid. Painters District Council 48 v. NLRB, 117 U.S. App. D.C. 233, 328 F.2d 534 (1964); Kennedy v. Sheet Metal Workers Local 108, 289 F.Supp. 65, 78 (C.D.Cal. 1968); Teamsters Local 386, 198 N.L.R.B. No. 129 (1972). The latter, which permit unit work to be transferred to other employers only if they are under contract with the union, are usually held illegal. NLRB v. Milk Drivers Local 753, 392 F.2d 845 (7th Cir. 1968); NLRB v. Teamsters Joint Council 38, 338 F.2d 23, 28 (9th Cir. 1964); Meat & Highway Drivers Local 710 v. NLRB, 118 U.S. App. D.C. 287, 335 F.2d 709, 717 (1964). But cf. NLRB v. Sheet Metal Workers Local 28, 380 F.2d 827 (2d Cir. 1967) (no violation of section 8(e), although clause was a union signatory clause on its face, where six-month period for initiating unfair labor practice charge on basis of clause itself had expired and where specific instance of application of clause did not involve impremissible secondary objectives).[8]

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[8] Relying on *Sheet Metal Workers*, the NMU argues that even if Article I, section 2 is analogous to a union signatory clause, the Board's order is nonetheless erroneous because the clause was not illegally applied here. The argument has no merit; the NMU's efforts to enforce the clause have interfered with the labor relations of a neutral employer, inciting the SIU to threaten to strike all Vantage ships. See note 6 supra.

Opinion of Court Below

While the distinction between union standards and union signatory clauses may seem somewhat artificial,[9] in the ordinary situation it serves at least two purposes: First, under a union standards clause, the union cannot insist that the secondary employees be organized by one of *its* locals. Thus, a competing union that has established similar wage scales and working conditions cannot be discriminated against through a work standards clause. Second, the courts' insistence on union standards clauses makes it somewhat more likely that the union will not sacrifice the interests of employees in the primary unit in the hope of making gains on another front. To get a restrictive clause in the contract, the union may have to give up demands for other employee benefits. If the clause is a union signatory clause, the union has an interest, independent of the interests of the employees being represented, in furthering its own organizational ends or in protecting the interests of its other bargaining units. If the clause is a union standards clause, however, the union will have no guarantee that the prospective subcontracting firm's employees will be members of the union. Thus, the likelihood that the clause is designed to foster the interests of the primary employees is somewhat greater.

The union standards-union signatory distinction suggests enforcement of the Board's order. We will assume without deciding that the NMU could legitimately have insisted that Commerce sell no ships unless union standards

[9] See Note, A Rational Approach to Secondary Boycotts and Work Preservation, 57 Va.L.Rev. 1280, 1293 (1971).

were preserved.[10] But for the NMU to bargain for a clause that gives it the right to continue manning the ship from its hiring hall goes beyond "work preservation" of the kind sanctioned in *National Woodwork* and the lower court cases in this area. The circumstances of the arrangement make it clear that the NMU's motivation was to protect the union's interest, rather than the interest of the work unit and its members. The practice of the shipping industry is for the purchaser's union to man newly-acquired vessels. This practice accords with the fleet-wide representation rule prescribed for the industry by the Board. Moore-McCormack Lines, Inc., 139 N.L.R.B. 796, 798-99 (1962). The NMU, of course, has no thought of abandoning its claims on any ships that are sold to an NMU company. Under the clause in this case, however the NMU extends its claim to ships *leaving* NMU companies. If transfers of ships are, as the Board found, fairly common in the industry, this practice will result, eventually, in NMU representation of virtually all the American-flag vessels in the trade or if the SIU retaliates, in constant disruption of the sore experienced here. Despite the NMU's claims that it is merely attempting to avoid erosion of its place in a dying industry, the broader impact of its "work preservation" clause is to advance its own organizational goals at the expense of the SIU. Clear anti-SIU motivation appears in the record in this case and was quoted in this court's

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[10] Since the union standards-union signatory distinction was developed largely in cases involving subcontracting, it is arguably inapposite here. Commerce's sale of its last ship might be compared to an employer's decision to close his factory and terminate his business altogether. But the Supreme Court has noted that the decision to terminate business is peculiarly a matter of management prerogative, Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 270, 85 S.Ct. 994, 13 L.Ed.2d 827 (1965), and we cannot conceive that a union would be entitled to seek more far-reaching job protection in that situation than in the ordinary subcontracting case.

decision in National Maritime Union v. Commerce Tankers Corp., supra, 457 F.2d at 1127, 1130 n.3.[11] See also McLeod v. National Maritime Union, 457 F.2d 490 (2d Cir. 1972); National Maritime Union, 174 N.L.R.B. 216 (1969). Not surprisingly, the cases indicate that such an objective is not protected as primary. See NLRB v. Operating Engineers Local 825, 400 U.S. 297, 91 S.Ct. 402, 27 L.Ed.2d 398 (1971); NLRB v. Milk Drivers' Local 753, 392 F.2d 845, 848 (7th Cir. 1968); cf. NLRB v. Sheet Metal Workers Local 28, 380 F.2d 827, 831 (2d Cir. 1967) (absence of anti-rival union animus cited as one basis for concluding respondent union did not violate section 8(e)). Indeed, the elimination of inter-union rivalry with respect to employees of the same employer and the consequent diminution of conflicts which may result in work stoppages are among the principal goals which the Board seeks to attain through implementation of its fleet-wide representation rule. Moore-McCormack Lines, Inc., supra, 139 N.L.R.B. at 798-99.

A second relevant factor is that it is the NMU's practice to remove all the seamen from a ship whenever the ship is sold. Therefore, the men working on the Commerce vessel will lose their jobs regardless of which union gains control of the ship.[12] The only difference will be that under the NMU contract, the jobs will be available to seamen with seniority in the NMU hiring hall, while under an SIU contract the SIU hiring hall will be used. Thus, the beneficiaries of the union's clause will not be those members now employed on the vessel, but the union as a whole. True,

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[11] This decision contains language which, at first glance, may appear to settle the issue of the legality of Article I, section 2, but we there held only that the Regional Director had "reasonable cause to believe" that the clause violated § 8(e).

[12] When the S.S. Thalia was sold to an NMU-affiliated employer, all of the ship's unlicensed seamen were removed from their jobs and replaced through the NMU hiring hall.

the NMU emphasizes that the Board assumed without deciding that the bargaining unit for Commerce employees could include seamen who may in the future be referred from the NMU hiring hall to Commerce. Interpreting this to mean that the Commerce bargaining unit could include all those entitled at any time to use the NMU hiring hall, the NMU argues that the clause is clearly lawful because prior case law establishes that a contractual provision designed to preserve work for employees in the bargaining unit is valid. We cannot accept this argument. While the cases may use the bargaining unit as a yardstick for the permissible scope of a work preservation clause, we are aware of none that do so where, as here, the suggested bargaining unit is many times larger than the actual work force of the primary employer and where the vast majority of the workers in the supposed unit have had no contact at all with the employer. Moreover, as the Board urges, if the NMU's argument were correct, Congress would have had no reason to enact the proviso to section 8(e) which validates union signatory agreements with respect to job site work in the construction industry,[13] since the hiring hall, upon which NMU's argument is based, is apparently the central source of employment in the construction industry, Teamsters Local 357 v. NLRB, 365 U.S. 667, 672-673, 81 S.Ct. 835, 6 L.Ed.2d 11 (1961), as it is in the maritime industry.

Petition for enforcement granted.

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[13] The "construction industry" proviso to § 8(e) reads:

> Provided, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work . . .

29 U.S.C. § 158(e).

Decision and Order

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 2—CE—44

—o—

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO;
COMMERCE TANKERS CORPORATION

and

VANTAGE STEAMSHIP CORPORATION.

—o—

On September 2, 1971, Trial Examiner Thomas A. Ricci issued the attached Decision in this proceeding. Thereafter, the General Counsel, Charging Party, and Intervenor[1] filed exceptions and supporting briefs; Respondent National Maritime Union filed a brief in opposition and Respondent Commerce filed a brief. On February 7, 1972, oral argument was held before the Board at which time all parties were represented and presented their positions.

The Board has considered the record and the Trial Examiner's Decision in light of the exceptions and briefs and oral argument and has decided to affirm the Trial Examiner's rulings, findings, and conclusions only to the extent consistent with the following.

Respondent Commerce Tankers Corporation (hereinafter called Commerce) is a New York corporation engaged in the business of owning and operating American Flag freight ships used for transporting goods and commodities. In July 1969, Commerce entered into a 3-year collective-bargaining agreement with Respondent National Maritime

[1] The Board by order of January 6, 1972, granted the motion of Seafarers International Union of North America to intervene.

Union (hereinafter called NMU) recognizing NMU as the exclusive bargaining agent for all unlicensed seamen employed on its vessels. Although it was not a member of any employer association for bargaining purposes, Commerce agreed to the same contract negotiated between the NMU and the Tankers Service Committee, a multi-employer association of ship owners. The contract also contained provisions, quoted in full in the Trial Examiner's Decision, to the effect that, in the event of a sale, Commerce would give NMU timely notice prior to the sale and obtain a written undertaking by the purchasers that it would recognize NMU as the bargaining agent for the vessel's unlicensed seamen and would accept the terms and conditions of the existing collective-bargaining agreement.

On December 23, 1970, Commerce entered into an agreement with Vantage Steamship Corporation,[2] the Charging Party, to sell its last remaining vessel, the SS *Barbara*.[3] This sales agreement contained no provision for compliance with "Article 1, Section 2" of the Commerce-NMU collective-bargaining agreement. When the NMU learned that Commerce had not complied with the terms of the collective-bargaining agreement, it demanded pursuant to said agreement arbitration of the dispute with Commerce. On February 8, 1971, the arbitrator issued an award[4] enjoining Commerce from selling the Barbara until Commerce

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[2] Vantage is a shipping company operating approximately four tankers with its unlicensed seamen represented by the Intervenor, Seafarers International Union.

[3] Commerce's other vessel, SS *Thalia*, had previously been sold in compliance with the contract.

[4] As the arbitrator's award dealt solely with the interpretation of the contract and did not consider the unfair labor practice issue, the Board will not defer to this award. *Monsanto Chemical Company*, 130 NLRB 1097, 1099.

complied with article 1, section 2, of the collective-bargaining agreement.[5]

In the interim, Commerce notified Vantage that the sale could not be consummated absent the undertaking required by the NMU labor agreement.[6] Vantage responded by rejecting any obligation to assume the NMU contract, noting that it was not part of the contract of sale, and filed unfair labor practice charges against both NMU and Commerce alleging violations of Section 8(e) of the Act. The Trial Examiner found that the contract clauses were lawful work preservation clauses saying "no more than the jobs of the employees covered by the contract could be saved for them in the event of a sale . . ." He further found that Commerce's employees constituted a separate single-employer bargaining unit consisting of all seamen who are presently working or would in the future work on tankers of Commerce under the provisions of the hiring hall, and that the NMU had the lawful right to preserve this work. Accordingly, he found no violation of Section 8(e) and recommended dismissing the complaint. The General Counsel, Charging Party, and Intervenor have excepted to the Trial Examiner's findings, contending that the clauses had an object outside the scope of the appropriate bargaining unit and were secondary in nature. Accordingly, they contend that the clauses were being used

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[5] This award was confirmed on March 2, 1971, and a preliminary injunction restraining Commerce from selling the vessel was issued. *National Maritime Union of America* v. *Commerce Tankers Corporation,* 325 F.Supp. 360 (D. C. N. Y., 1971). On appeal the injunction was vacated. See *McLeod* v. *National Maritime Union* [*Prudential-Grace Lines, Inc.*]. F.2d (C. A. 2, March 17, 1972).

[6] Commerce on January 13 notified NMU in writing that the sale of the vessel would be in compliance with art. 1, sec. 2, of their contract. Accordingly, based on the above evidence, we find that Respondent Commerce reaffirmed this provision within 6 months of the filing of the charge herein.

to further union institutional interests and not to preserve the work for Commerce's present or dislocated employees.

We agree with the positions of the General Counsel, Charging Party, and Intervenor for the following reasons:

At the outset, it should be noted that in the maritime industry the sale of a vessel is a fairly common occurrence. Thus, in the years 1964 to 1971, approximately 400 American Flag vessels (ocean-going merchant-type ships of 1,000 gross tons and over) averaging 50 per year were sold from one U.S. company to another.[7] Similarly, during this same period approximately 150 U.S. Flag vessels were transferred foreign, excluding vessels sold foreign for scrapping. Accordingly, the transactions involved herein do not represent a novel situation but occur in the normal course of doing business in the maritime industry. In these circumstances we conclude that in the maritime industry buyers and sellers of ships are doing business with each other within the meaning of Section 8(e). As it is unnecessary to our decision, we have not considered questions concerning the applicability of this section to the sale of capital assets in other industries or in other circumstances.

As the Supreme Court has stated, the basic question in determining if Section 8(e) has been violated is whether the "Union's objective was preservation of work for [unit] employees, or whether the agreements . . . were tactically calculated to satisfy union objectives elsewhere . . . The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees."[8] Thus, where an

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[7] These statistics, of which we take administrative notice, are a matter of public record compiled by the U.S. Department of Commerce, Maritime Administration.

[8] *National Woodwork Manufacturers Association* v. *N.L.R.B.*, 386 U.S. 612, 644-645.

object of a clause is to aid union members generally rather than members of the unit, the object is secondary and unlawful.[9]

As the Trial Examiner recognized, these basic principles lead to the necessity of determining the scope and composition of the unit in question, and we agree with his conclusion that the appropriate unit is the single-employer unit and not a multiemployer or industrywide unit. And we can assume without deciding that this single-employer unit could include employees who may in the future be referred from NMU hiring halls to work on ships operated by Commerce. But such an assumption does not lead to the Trial Examiner's conclusion that the clauses in issue are lawful work preservation clauses which do no more than save the jobs of the employees covered by the contract in the event of a sale.

Thus, because of the unique nature of this industry, virtually all hiring is accomplished through hiring halls located in various ports. An employee is referred to a ship on a permanent basis and retains that position for as long as that ship operates out of the port of referral. However, when a ship is either sold, operated out of another port, or placed in layup status, the employees lose their jobs and a new crew is referred, either through the hiring hall in the new port or when placed back in service through the hiring hall in the old port.[10] As a practical matter therefore, in the light of this practice, although each ship has a permanent stable work force of employees assigned to it through the hiring hall, whom the Union clearly has a lawful interest in protecting against job loss, the clauses in question in

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[9] *Meat and Highway Drivers, Local 710, Teamsters* [*Wilson & Co.*] v. *N.L.R.B.*, 335 F.2d 709, 716 (C. A. D. C.).

[10] When the vessel *Thalia* was sold by Commerce to an NMU signatory, for example, the Commerce crew left the ship and a new crew was referred from the hiring hall in the new port.

fact *do not* protect those employees at all in the event of a sale, but instead, as here, serve to preserve those *jobs* for those other seamen who may be eligible for referral through the NMU hiring hall at the different port out of which the new owner is to operate. In these circumstances, these clauses place restrictions on sales which are not strictly "germane to the economic integrity of the principal work unit . . ."[11] Instead they only insure that the purchasing employer is under contract with the NMU. Consequently, to conclude that these clauses are lawful would obliterate the distinction between unit work preservation and union signatory clauses and nullify the congressional purpose of Section 8(e).

Accordingly, on the basis of the foregoing considerations, we find that the NMU's work preservation argument is without merit and that the contract is not valid under Section 8(e) of the Act.[12]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents, National Maritime Union of America, AFL-CIO, its officers, agents, and representatives, and Commerce Tankers Corporation, its officers, agents, successors, and assigns, shall:

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[11] *Orange Belt District Council of Painters No. 48* [*Calhoun Drywal Co.*] v. *N. L. R. B.*, 328 F.2d 534, 538 (C. A. D. C.).

[12] Although not germane to our decision, we do not adopt the Trial Examiner's interpretation of *Moore-McCormack Lines, Inc.*, 139 NLRB 796. See *National Maritime Union of America, AFL-CIO (Overseas Carriers Corporation)*, 174 NLRB 216, and *National Maritime Union of North America, AFL-CIO (Prudential-Grace Lines, Inc.)*, 194 NLRB No. 199.

1. Cease and desist from entering into, maintaining, enforcing, or giving effect to article 1, section 2, of the collective-bargaining agreement entered into on July 1, 1969, between Respondent NMU and Respondent Commerce, or to any like or related clauses in any other collective-bargaining contract whereby an employer agrees, in substance, to cease or refrain from doing business with any other person within the meaning of Section 8(e) of the Act.

2. Take the following affirmative action:

(a) Post at Respondent NMU's business offices and meeting halls and at Respondent Commerce's place of business copies of the attached notice marked "Appendix."[13] Copies of said notice, on forms provided by the Regional Director for Region 2, after being duly signed by Respondent's representatives, shall be posted by Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members and employees are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps the Respondents have taken to comply herewith.

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[13] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Decision and Order

Dated, Washington, D.C., May 16, 1972.

/s/ EDWARD B. MILER
Chairman

/s/ JOHN H. FANNING
Member

/s/ HOWARD JENKINS
Member

/s/ RALPH E. KENNEDY
Member

/s/ JOHN A. PENELLO
Member

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

To all members of National Maritime Union of America, AFL-CIO, and to all employees of Commerce Tankers Corporation

WE WILL NOT enter into, maintain, enforce, or give effect to article 1, section 2, of our collective-bargaining agreement, or any other contract provision whereby any employer ceases or refrains or agrees to cease or refrain from doing business with any other person within the meaning of Section 8(e) of the Act.

NATIONAL MARITIME UNION
OF AMERICA, AFL-CIO
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

COMMERCE TANKERS
CORPORATION
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 36th Floor, Federal Building, 26 Federal Plaza, New York, New York 10007, Telephone 212-264-0300.

/s/ ROBERT VOLGER
Associate Executive Secretary

Trial Examiner's Decision

[Dated September 2, 1971]

Statement of Case

Thomas A. Ricci, Trial Examiner: A hearing in the above-entitled proceeding was held before the duly designated Trial Examiner on July 6, 1971, at Brooklyn, New York City, on complaint of the General Counsel against National Maritime Union of America, AFL-CIO, herein called the NMU, and Commerce Tankers Corporation, herein called Commerce. The charge was filed by Vantage Steamship Corporation on February 16, 1971, and the complaint issued on June 9, 1971. It alleges that the two Respondents have violated and are violating Section 8(e) of the Act by maintaining and giving effect to a secondary boycott agreement between themselves. All parties participated in the hearing. All parties also stipulated that the transcript of testimony, and the exhibits received, in an injunction proceeding heard in the United States District Court for the Southern District of New York on June 4, 1971, be received as evidence here, and be considered by the Trial Examiner in making his decision in this case as though those witnesses had testified before the Trial Examiner and those exhibits taken into evidence by him. Briefs were filed by the General Counsel, both Respondents, and the Charging Party. An *amicus curiae* brief was also received from Seafarers International Union of North America and it affiliates, here collectively called the SIU.

Upon the entire record, and from my observation of the sole witness who appeared at the hearing, I make the following:

FINDING OF FACT

I. The Business of the Shipping Companies

Vantage Steamship Corporation, a New York State corporation, has its principal office in New York City and

is engaged in the business of owning and operating American flag freight ships used for transporation of goods and commodities in interstate and foreign commerce. During the calendar year 1970, a representative period, Vantage derived a gross revenue in excess of one million dollars in the course of its business. Commerce Tankers Corporation, a wholly owned subsidiary of Vernitron Corporation, a New York corporation, is also engaged in the business of owning and operating American flag freight ships used for transporting goods and commodities in interstate and foreign commerce. During 1970 it derived a gross revenue in excess of $500,000 in the course of its operations. I find that Vantage and Commerce are engaged in commerce within the meaning of the Act and that it will effectuate the purposes of the Act to exercise jurisdiction herein.

II. The Labor Organization Involved

I find that National Maritime Union of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

The Issue Presented

This is a secondary boycott case and presents essentially a question of law. There is no serious dispute as to the pertinent facts for they rest almost entirely upon documents received in evidence. What is to be inferred from these facts, how certain Board and court decisions related to the issue of this case are to be read, constitutes the substance of the five separate briefs submitted by the competing lawyers who appeared at the hearing. Like the facts proved by admittedly authentic evidentiary docu-

ments, the decisional precedents themselves, of course, cannot be changed.

In 1969 Commerce, a shipping company, owned and operated two seagoing tankers—the *S.S. Thalia* and the *S.S. Barbara;* in July of 1969 it signed a 3-year collective-bargaining agreement with the NMU covering unlicensed seamen employed on these vessels. It is a 100-page printed booklet and includes the following clause:

Article 1.

Section 2. Sale and Transfer of Vessels. (a) The Company agrees with respect to any vessel which is presently under or may hereafter come under this Agreement, that if during the term of this Agreement said vessel is sold or transferred in any manner to any other business entity not covered by this Agreement for operation under United States flag (but not including a vessel which the Company bareboat charters and the charter is terminated), said vessel shall be sold or transferred with the complement of employees who either are or shall be provided by the Union in acordance with the terms of this Agreement, or such number as may be agreed upon between the Union and the transferee. The term "transfer" shall be construed to include any chartering of a vessel by the Company.

> (b) The Company obligates itself to obtain for the benefit of the Union a written undertaking with the Union to be executed by the business entity to which the vessel has been sold or transferred that for the full term of the Agreement all of its terms and provisions shall apply to said vessel except as hereinabove provided and that said business entity will fully comply with all the terms and provisions of this Agreement and any amendments thereto to preserve the jobs and job rights of the Unlicensed Personnel covered by this Agreement and to protect

> and maintain the wages, pension rights and other economic benefits and working conditions provided such personnel under this Agreement.

On December 23, 1970 Commerce executed a contract to sell the *S.S. Barbara* to Vantage, another shipping company which was at the time operating four tankers, either directly owned or under agency with commonly owned corporations; the sales agreement contained no provision for compliance, on the part of Commerce, with Article 1, Section 2, of its NMU agreement. The unlicensed seamen working for Vantage were then and still are represented by the SIU, under regular union contract. When the NMU learned that Commerce had not arranged for Vantage to employ "the complement of employees" used by Commerce on the *S.S. Barbara,* nor exacted from Vantage "a written undertaking with the Union" guaranteeing that the "terms and provisions" of the NMU agreement would continue to apply to the *S.S. Barbara,* it demanded, by letter dated January 11, 1971, that Commerce do so. On January 13, the president of Commerce replied he had advised his Company's selling agent that the "NMU . . . must continue to man the vessels after their sale, and that this was to be made a condition of the sale; . . ." Commerce then tried to persuade the NMU to waive Article 1, Section 2, in the case of the *S.S. Barbara,* was unsuccessful, and advised Vantage, by telgram dated February 6, that "a written undertaking to comply with the terms and conditions of the Union [*NMU*] agreement" had to be executed by Vantage else the sale might not be consummated.

At this point the NMU invoked the arbitration clause of its collective-bargaining agreement with Commerce, won an arbitration award, and then obtained a court injunction in the Federal District Court stopping the sale.[1] Commerce

[1] *NMU* v. *Commerce Tankers,* 76 LRRM 2692.

contested both the arbitration and injunction proceedings. On February 16, 1971 Vantage filed an unfair labor practice charge against both NMU and Commerce.

It is alleged that in January and February of 1971 NMU and commerce "reaffirmed" their 1969 contract with respect to Article 1, Section 2, and thereby violated Section 8(e) of the Statute.[2] The theory of illegality is that by their agreement the two parties enabled NMU to effectuate its design against other employers—in this instance Vantage—, to negotiate conditions of employment of NMU members working for employers other than Commerce. In the total picture so presented, it is said, Vantage is the primary employer and Commerce the secondary one, hence, a viola-

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[2] 8(e) it shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: Provided, that nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided further, that for the purposes of this subsection (e) and section 8(b)(4)(B) the terms "any employer," "any person engaged in commerce or in industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer," or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, that nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

tion of Section 8(b) (4),[3] or, a secondary boycott brought about by the type of hot cargo contract outlawed by Section 8(e).

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[3] Section 8(b) It shall be an unfair labor practice for a labor organization or its agents—

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work.

NMU defends on the ground that the clauses under attack are no more than work preservation or work standards preservation provisions, entirely lawful under the decided cases. Commerce argues that even assuming the clauses were illegal in the circumstances, the complaint must be dismissed with respect to the employer party to the agreement because more than 6 months had passed after its initial execution before the charge was filed. See Section 10(b) of the Statute. It denies that it "reaffirmed" the agreement within the 6-month period immediately preceding the filing of the charge, and asserts instead that it always disputed the validity of the clauses and resisted enforcement at every turn. Commerce also contends that in any event it must be entirely exculpated because it only accepted the entire agreement in consequence of economic pressure brought by the NMU, against its better judgment. Neither of these defenses—Statute of limitation and economic coercion by the NMU—need be answered in this decision, because the complaint must be dismissed on the ground that the NMU contract is not unlawful.

Vantage, the Charging Party, joined with the General Counsel in saying the contract on its face, and in the light of extrinsic evidence, is aimed at achieving a secondary and prohibited goal. And the SIU, participating in this case as *amicus*, "concurs" with the arguments set out in the briefs of both the General Counsel and Vantage, and reiterates the contention Article 1, Section 2, is tantamount to a hot cargo clause.

THE GENERAL COUNSEL'S PER SE THEORY OF ILLEGALITY

At the hearing the General Counsel explained that the complaint is intended to prove the commission of unfair labor practices in two ways, or perhaps two separate unfair labor practices by each Respondent, one by mere appraisal of Article 1, Section 2, apart from any extrinsic evidence, and the other after consideration of facts external to the

contract.[4] Throughout the hearing, however, as well as in his brief, the General Counsel, and the Charging Party, offered evidence on many facts standing apart from the contract itself, and both merged their contentions so as to obscure the per se argument. Indeed, at one point the General Counsel objected to evidence offered by the Charging Party on the ground that it is not relevant to the issue of the complaint at all. In their totality, the related or unrelated facts placed in evidence are intended to support two broad assertions of the prosecution side. One is that National Labor Relations Board "doctrine" precludes bargaining units smaller than "fleetwide" in scope in the shipping industry, and that therefore, regardless of the wording of the subject clauses, they are unlawful because Commerce is or was engaged in shipping. The second is that, unlike people who are employed by other companies, seamen are assigned to their jobs and go to work in rotation out of a hiring hall, and that for this further reason, again no matter how Article 1, Section 2 be written, it must be prohibited.

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[4] From the transcript:

Q. (By the Trial Examiner): ". . . in order to hold . . . these clauses . . . illegal? Is it necessary to look outside that contract at all?

* * *

A. (By Mr. Bennett): "I think not. I think without any intrinsic (sic) evidence at all, this contract is invalid.

Q. To hold this contract illegal with respect to the clauses mentioned in the complaint, it is necessary to look anywhere for anything?

Mr. Bennett: It is not necessary, no.

* * *

From the transcript in the District Court:

Mr. Bennett: . . . the only reason we bring up the sale of the Barbara at all in this proceeding is to show how the clause, the NMU clause, actually operates in practice, but the issue before you actually could even be decided without this testimony."

On its face the contract language being examined limits Commerce's freedom to do business with other employers; it cannot sell vessels to prospective purchasers who refuse to hire the old seamen and who refuse to continue their existing conditions of employment. Although this fact alone fits the clause literally into the expressed proscription of Section 8(b)(4), it is not therefore unlawful. This much is conceded by all parties. *National Woodwork Mfgrs. Assn.* v. *N.L.R.B.* 386 U.S. 612. Reading further, the contract provides that vessels can only be sold "with the complement of employees who either are or shall be provided by the Union in accordance with the terms of this agreement," and that the purchaser must agree, in writing, that it will abide with all the "terms and provisions" of the entire NMU contract. Clearly this language says no more than that the jobs of the employees covered by the contract are to be saved for them in the event of sale of part or all of the business, or, in the language of the cases, "work preservation." For legal precedents, see *Kennedy* v. *Sheet Metal Local 108,* 280 F.Supp. 65, 68 LRRM 3057. It no less clearly says the purchaser must also honor the established wage scale, and other conditions of employment, what the cases call "preservation of work standards." These are the lawful objectives which any union may seek to assure to the employees in a collective-bargaining agreement, despite the seeming limitation imposed by Section 8(b)(4). The contract does not speak of membership in one union or another, or of strangers to the contract bargaining unit.

Conceding that a union has a right to protect the jobs of the employees it represents, and to concern itself about their pay and other emoluments in the event of a change

in the identity of their employer,[5] the General Counsel nevertheless sees evil in the fact this clause also requires the purchaser to sign something to that effect. He therefore calls it a "signatory" clause, and likens this case to other situations where the contracting employer may only do business with employers who have "signed" contracts with the same union. The position exalts words over substance. When a successor takes over the existing complement of employees, whether it does so voluntarily or because the seller will not otherwise transfer the business to him, he is not only obligated in law to recognize and deal with the union already functioning for the employees (*Maintenance, Inc.*, 148 NLRB 1299), but he is also required to honor the contract that is in effect. *Burns International Detective Agency*, 182 NLRB No. 50, reversed, 441 F. 2d 911 (C.A. 2), with deference to the Court. Had Vantage taken over the *S.S. Barbara* with its seamen complement, it would have been obligated to recognize and deal with the NMU, and indeed to honor the NMU contract. If saddling Vantage with the NMU contract is secondary because that company is not the employer at the time the Respondent Union's contract is signed, does the Board do violence to Section 8(b)(4) when it burdens the successor with a predecessor's contract? To require of Vantage that it also sign some document to assure accomplishment of both objectives therefore in no way alters the substance of what lay at the bottom of Article 1, Section 2, or of what is literally expressed therein. The right to work preservation would appear particularly equitable here in view of uncontradicted testi-

[5] *John Wiley & Sons* v. *Livingston*, 376 U.S. 543: "The objectives of national labor policy, reflected in established principles of Federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship."

mony that the "thrust" of unionism among unlicensed seamen was "more toward job security," "equitable distribution of available work," than toward "economic benefits."

One other phrase appears in the clauses and is suggested as indicating an illegal objective—protection of job rights for seamen other than employees of Commerce covered by the contract. The clause speaks of "the complement of employees who either are or shall be provided by the Union in accordance with the terms of this agreement." This language is direct reference to Article 1, Section 8, "Employment Review Board," of the same contract. This clause sets up a hiring hall, here called an "employment office," from which by agreement of the parties to the contract vacancies on the vessels are filled according to precise arrangements of priority detailed in the agreement. Sailors come and go on ships, for it is the nature of the industry today, and has been since the time of Ulysses. More below about the hiring hall.

It is conceded that if Article 1, Section 2, be deleted from the NMU contract there would be nothing unlawful in it. Considered apart from all else that appears in the record, there is nothing unlawful about it even including Article 1, Section 2.

The Moore-McCormack Case: 139 NLRB 796

The many collateral facts offered by both unions as well as by both companies, in one way or another touch upon the question of appropriate bargaining units, industry-wide, fleetwide, multiemployer, single employer, single vessel, etc. Clarification of conflicting contentions can only follow definitive statement of what the Board has decided on this subject in past decisions. The principal case upon which the General Counsel and the SIU side

of the dispute rely is *Moore-McCormack,* decided in 1962. As they read that decision, the Board there "enunciated" "a general proposition," a "general rule," a "doctrine," that in the shipping industry bargaining units must be fleetwide, that is, must encompass all vessels owned by any single shipping company in a single unit of its own. So reading the Board's decision in *Moore-McCormack,* the General Counsel argues that "by operation of Board law" Vantage could not deal with the NMU for seamen on the *S.S. Barbara* even if it so wished, that the newly acquired vessel was merged into the existing four-ship fleet-wide unit of Vantage, and, in the end, that its seamen of necessity must be represented by the SIU under whatever terms and conditions of employment are provided in the SIU contract. It is stipulated by all that the substantive terms, including economic benefits, differ, as between the NMU and the SIU contracts.

Apart from considerations that would otherwise have to be dealt with, this entire argument falls if only because *Moore-McCormack* does not establish any such rule of law. Indeed, the Board's *decision* in that case goes exactly the other way. Automatic absorption of any acquisition into an existing bargaining unit is simply not the law. In 1957 *Moore-McCormack,* already operating a fleet of seagoing freighters with seamen represented under NMU contract, bought eight operating vessels from Seas Shipping Co. The unlicensed seamen then on the Seas Shipping vessels were represented by the SIU. NMU made the argument that new vessels had to be absorbed into *Moore-McMormack's* existing unit, that only a fleet-wide unit could be appropriate in the shipping industry. And SIU insisted the newly acquired ships could, and should remain SIU vessels if the seamen so wished. The Board rejected the so-called accretion argument and refused to lump the added vessels with the old. Five years later, in 139 NLRB 796, the Board reaffirmed its earlier decision, and again

refused to merge the now seven remaining Seas Shipping vessels into the NMU group without a majority vote of each of the vessels.

What the SIU relies upon today, to support its now diametrically opposite view, is passing language by three Board members in their weighing of the balancing factors that are always considered when the Board makes unit determinations under the Statute. Those Board members recognized the desirability, for more than one reason, of fleet-wide units among ships. Two Board members disassociated themselves from that descriptive language. If a rule can be said to emerge from that decision in its entirety—after the Board was through finding that the countervailing facts of the case dictated smaller than fleet-wide units—it is that every case must be decided upon its own facts, as has been done since 1935. "But these reasons for finding a fleet-wide unit appropriate may be overborne in a particular case by special circumstances which indicate the unsuitability of applying the general rule."

But this mistaken reliance upon *Moore-McCormack* falls short of condemning Article 1, Section 2, of the NMU contract for an additional reason. If the purchaser had been a newly formed company, or one that had never operated seagoing tankers, would the restrictive clause be deemed proper? It is difficult to see how the fortuitous circumstances of a particular purchaser could serve to make an otherwise lawful contract illegal.

Single Versus Multiemployer Unit

In the end the varied contentions urged by every one of the disputants here focus upon the special nature of the hiring hall. It is therefore necessary, still before reaching that question, to make clear the scope of the

unit of Commerce employees who are, or were covered by its union contract. As written, the contract is between "the Company" and "the Union as the sole collective-bargaining agent for the unlicensed personnel employed aboard all vessels of the Company. . ." It was signed by Commerce and NMU as direct and single parties. It must be found that the unit underlying the contract is limited to the employees of Commerce, a single employer bargaining unit. The agreement was negotiated between the NMU and the representatives of Tankers Service Committee, an association of shipping companies. Commerce has never been a member of that, or any other multiemployer association. It did not authorize the committee to represent it in collective bargaining, it did not ratify or adopt whatever the committee did or signed, it never delegated authority to any group or association to bargain on its behalf. It is conceded that in all its dealings with the NMU Commerce acted alone, entirely separate from the collective-bargaining representative of any other employer. See, *Moveable Partitions, Inc.*, 175 NLRB No. 149: "While it [the employer] has adopted contracts negotiated by the Master Painters Association, this alone is not a sufficient basis for including it in a multiemployer unit."

All of the shipping companies which have signed the identical contract, whether members of Tankers Service Committee or separate independent employers, together use the single NMU hiring hall when seamen are required on their vessels. From this one fact NMU contends there has come into being a multiemployer bargaining unit joining all employers who have signed this contract and who use this hiring hall. ". . . all the seamen shipping aboard NMU contract vessels are for practical purposes employees of all the contract employers." The position ignores too much Board law and too many basic principles underlying the Statute as a whole, to be persuasive. Every employer has a right to bargain with respect to its employees and

only its employees; indeed the Statute speaks first and foremost of the "employer" unit as appropriate. More important, employees have a right to decide for themselves how to deal with their own direct employer. These principles are not obliterated by the fact that Commerce, like the other employer parties to the NMU contract, pays for vacations earned by its seamen by contributing a certain amount into a common vacation fund then enjoyed by all seamen who find work out of the hiring hall, or that it contributes to a common welfare and pension fund, similarly administered on a broader fiscal basis. Commerce still pays only what is due under its contract for work performed by its employees on its vessels. If the employees of Commerce choose to mix the benefits they receive on these aspects of their employment conditions which like benefits they earn when working for other companies on other sea voyages, it is a matter that stands apart from their collective-bargaining relations with this employer.

EMPLOYEES INCLUDED WITHIN THE SINGLE-EMPLOYER UNIT

The final attack upon Article 1, Section 2, is that it is not only aimed at preserving work for the employees employed by Commerce, or included within the single-employer bargaining unit which underlies this agreement, but is also intended to look after the work standards and job rights of unrelated seamen, members of NMU who have nothing to do with this contract at all. And this argument, like the others, points to the operation of the hiring hall as evidence, not to the language of the clause itself.

It is a rule of law that a work preservation clause is lawful only when it is restricted in operation to the limits of the bargaining unit involved, or to the employees who normally work within that unit. As stated by the Board

in *International Union, United Mine Workers*, 165 NLRB 467: ". . . where an object of a clause is to aid the union members generally rather than members of the unit, the object is secondary and unlawful. This observation leads, of course, to the necessity of determining the scope of the unit in question." A more pertinent wording of the rule appears in *Orange Belt District Council* v. *N.L.R.B.*, 328 F. 2d 534 (C.A.D.C.):

> "We have phrased the test as whether the clauses are "germane to the economic integrity of the principal work unit," and seek "to protect and preserve the work and standards [the Union] has bargained for," or instead "extend beyond the [contracting] employer and are aimed really at the union's difference with another employer."

Unlike the more common bargaining agreement, the NMU contract does not in *haec verba* set out a description of the bargaining unit; it speaks only of "unlicensed personnel," and this is because for maritime employment there has come into being the hiring clause. Identification of the employee complement covered by union contract in this case, therefore, is a bit more indirect than usual. Whose work is it that the Union seeks, and has a right to preserve? In the search certain fundamental truths must be kept in mind. (1) Every labor contract presupposes the Union speaks for somebody, and a basic bargaining unit there always must be. The NMU could not otherwise have standing at all as the exclusive representative of anybody, and its such status in this case is not questioned. (2) While every union acts as agent for employees, human beings working for a living, the bargaining unit is conceived in terms of jobs, occupations, positions, and not in terms of the particular individuals who fill the jobs at any given moment. Every unit description set out

in a Board direction of election lists occupations, or job classifications, and never lists the names on the payroll. And whenever, in resolving a question concerning representation, the Board considers questions of eligibility, such as when ruling on challenges, its decision turns upon the nature of the job—part-time, seasonal, craft or non-craft, etc.—and not on whether it is Tom, Dick or Harry who is at work. (3) The fact that individual workmen at times enter the unit and at times leave it neither destroys the unit nor alters it. Some units are more consistently occupied by the same body of workmen than others. Whenever a union contracts to preserve the work opportunities for a very stable employee complement, the fact that four or five of perhaps 50 positions are vacant at any given moment does not free the employer to contract away those jobs in violation of the work preservation clause in the agreement. (4) Use of a hiring hall for rotation filling of unit jobs as they become vacant in the normal operation of the employer's business, is not unlawful, providing the method agreed upon, or practiced, does not encourage or discourage union membership in violation of Section 8(a) (3) of the Act. *Local 357* v. *N.L.R.B.*, 365 U.S. 667.

A final truth not to be forgotten in this case is that the NMU hiring hall operated for East Coast tanker shipping is entirely proper and lawful. The Commerce contract being considered calls the hall an "employment office," details how applicant qualification is determined by a review board composed of management and union representatives, and provides preferential grouping of employees for referral purposes—groups 1, 2, and 3. When the General Counsel stated on the record that if the disputed Article 1, Section 2, were removed from this contract it would be absolutely legal in all respects, of necessity he was saying that the union hall established by the contract is also

in every respect proper. But even apart from the concession, absent a complaint and proof of any improper activity in connection with this hiring hall, the case must proceed on an assumption that it is being correctly administered.

It is against these last enumerated facts, or unquestionable rules of Board law—whatever they be called—that unit questions in secondary boycott cases must be examined. "... the units which control the determination of the primary or secondary nature of subcontracting clauses are those units found by the Board under its customary standards to be appropriate for collective-bargaining purposes ..." *United Mine Workers, supra.*

Returning to the question of this case: Who are the people who are embraced within the bargaining unit underlying NMU's contract with Commerce? They are those seamen, present and future, who are at work, or may hereafter be entitled under the provisions of this hiring hall to go to work, on tankers of Commerce as the normal going and coming of employees on and off the vessels constantly creates the need for referrals—sometimes permanent berths, sometimes temporary places. The NMU has a right to preserve *this* work *for these* people, and it matters not that today one cannot know the identity of a seaman who will tomorrow be entitled to fill the next vacancy. It would be equally irrelevant, to a comparable question of work preservation, if a pattern maker with 20 years of uninterrupted service were to retire; the International Association of Machinists would still be entitled to protect that job for the total employee complement embraced within a machine shop bargaining unit. Neither the question—who is entitled to protection?—nor the answer is changed merely because, as this record shows, a sailor's single voyage may last 5 days or 4 months, because he may take 4 vacations a year, because he can literally "quit" a job and still be entitled to return to the hiring hall roster, or

because half the seamen dispatched from the NMU hiring hall go to temporary jobs.[6]

As the Respondent NMU contends, Article 1, Section 2, is purely a work preservation clause. The General Counsel brought out the fact that it is possible for a man who has worked 10 years on the Great Lakes, for another company there and covered by another NMU contract there, to quality for permanent assignment to a Commerce vessel on the East Coast in the normal operation of this hiring hall. Implicit in his position is the assertion that that man is outside the bargaining unit, that by protecting his work opportunity the NMU is using the Commerce contract in the interests of union members having nothing to do with this one employer, and, in the end, under cover of this ostensible work preservation clause, indirectly encouraging union membership in persons employed by nonunion, or rival union employers. If there were merit in this argument it could be urged with equal force with respect to any seaman who has long worked for another company on the East Coast, shipped out a few wharfs away from the Commerce dock, was never on a Commerce ship berth, and comes up next on the hiring hall seniority roster for assignment to a Commerce vessel. In that event, the entire hiring hall is being operated unlawfully because the NMU is using it as a device to force all employers to discriminate in favor of its members.

The short answer lies in the fact this hiring hall is not illegal, and all seamen who are referred out of it go to

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[6] The composition of the single-employer bargaining unit in the shipping industry as here explained, may not be in conflict with the real intendment of the NMU brief, which says, among other things, "we are not concerned just with the jobs of the particular seamen employed aboard the *S.S. Barbara* at the time the vessel is sold, . . ." What this means is that any seaman having the right under the hiring hall provisions of the single-employer contract may one day qualify for referral, and is therefore conceptually included in the limited unit.

work in one appropriate bargaining unit or another, always correctly places, without illegal discrimination, and within the coverage of the unit description of each separate contract. The hiring hall is objective, it is not invidious, and it is not NMU—membership tainted. So long as each man fits the underlying formula for preferential grouping, and is assigned in keeping with objective criteria, it is immaterial where he worked before. If more be needed to show the fallacy in the prosecution argument, it is the fact, also clear on this record, that a member of the SIU can also qualify, and win employment with Commerce, out of this same hiring hall.

The complaint must be dismissed. The realities, and the substantive legal precedents that lead to this conclusion, are not affected by the many further contentions advanced by the General Counsel and the Charging Party. A month before contracting to sell the *S.S. Barbara,* Commerce sold its other ship, the *S.S. Thalia,* that one to an NMU contract shipping company. Someone said at the hearing that when that happened the seamen on the vessel came off and the berths were opened to bidding from the hiring hall. No one explained the situation that then prevailed on this ship, and the statement in the Charging Party's brief that SIU members were taken off and NMU members put aboard in their place is not based on any evidence. Absent proof of illegal discrimination it must be assumed that work assignments to that ship, like referrals constantly being made from the hiring hall, were in strict accordance with the contract terms and perfectly lawful. Transfer by Commerce to foreign flag ships are not restricted by the work preservation clause. Is saving half a loaf no saving at all because it does not save the whole loaf? Logic dictates a negative answer. There is persuasive evidence that the American shipping industry is in decline, that increasingly American flag ships are being transferred for operation

under foreign flags. It is said that NMU insistence upon the high work standards established for seamen under its contract are responsible for this loss of jobs to Americans, and should therefore be stopped. Curiously, the SIU also offered to prove its own contract wages and indirect economic benefits compare favorably with those of the NMU. But this is a policy question for authorities other than the Board to consider, at least in a case as clear as this one on the law as it is written.

A final suggestion in the Vantage brief, in which the SIU concurs, is that "the institutional apprehensions or aspirations of labor organizations" are not served by employees seeking to protect their jobs in this fashion against encroachment by other workmen in the same industry. It is for this same reason that the Board in *Moore-McCormack* spoke of the "advantages" to be found in "single unit," and "the elimination of interunion rivalry" and "diminution of conflicts" that might follow broader groupings of seamen. The salutary objective of staying the decline of the entire industry would also be furthered by an end to duplication of both unions and hiring halls in the concerted activities of seamen altogether. After all, collective bargaining as conceived by the Statute envisages not union vis-a-vis union, and not employees vis-a-vis employees, but union and employees vis-a-vis management.

Recommended Order

On the basis of the record in its entirety I hereby recommend that the complaint be, and it hereby is dismissed.

September 2, 1971.

/s/ Thomas A. Ricci
Trial Examiner

Order Correcting Decision and Order

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

Case 2-CE-44

—o—

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO;

COMMERCE TANKERS CORPORATION

and

VANTAGE STEAMSHIP CORPORATION

—o—

New York, N. Y.

On May 16, 1972, the National Labor Relations Board issued a Decision and Order [1] in the above-entitled proceeding in which an inadvertent error appears.

IT IS HEREBY ORDERED that said Decision and Order be, and it hereby is, corrected by modifying footnote 5 to read as follows:

> 5. This award was confirmed on March 2, 1971, and a preliminary injunction restraining Commerce from selling the vessel was issued. *National Maritime Union of America* v. *Commerce Tankers Corporation,* 325 F.Supp. 360 (D.C.N.Y., 1971). On appeal the injunction was vacated. See *National*

[1] 196 NLRB No. 166. (Volume number appears as corrected on May 18, 1972.)

Order Correcting Decision and Order

Maritime Union of America v. *Commerce Tankers Corporation*, F.2d (C.A. 2, March 22, 1972).

IT IS FURTHER ORDERED that the Decision and Order, as printed, shall appear as hereby corrected.

Dated, Washington, D. C., May 22, 1972.

By direction of the Board:

ROBERT VOLGER
Associate Executive Secretary

Order Correcting Decision and Order

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

Case 2-CE-44

New York, N. Y.

———o———

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO;
COMMERCE TANKERS CORPORATION

and

VANTAGE STEAMSHIP CORPORATION

———o———

[Dated August 31, 1972]

On May 16, 1972 the National Labor Relations Board issued a Decision and Order [1] in the above-entitled proceeding in which the Board found that the Respondent violated Section 8(e) of the National Labor Relations Act, as amended.

Thereafter, on June 2, the Respondent National Maritime Union of America, AFL-CIO (hereinafter called NMU) filed a Motion for Reconsideration, Rehearing, or Reopening of the Record. It alleges, *inter alia*, that the Board's Decision and Order contains material errors of fact relating to the hiring and permanent status of NMU's seamen when a ship operates out of different ports of referral. Specifically, it contends in pertinent part that the Board erroneously found that an employee retains a permanent job aboard a ship only "for as long as that

[1] 196 NLRB No. 166.

ship operates out of the port of referral" and loses permanent employment whenever that vessel is ". . . sold, operated out of another port, or placed in layup status . . . " NMU requests that the Board should either correct these errors or if the factual errors are deemed relevant to the merits of the case, to reopen the record for the taking of additional evidence.

The Charging Party, Vantage Steamship Corporation, the General Counsel, and the Intervenor, Seafarers International Union of North America, filed briefs in opposition to Respondent's motion and Respondent filed a reply brief.

The Board having duly considered the issues raised by Respondent's motion,[2] finds that certain of its factual findings, namely that an employee retains permanent crew status only so long as his ship operates out of the port of referral or until it is placed in layup status, are in error and warrant correction. Thus, the Respondent's motion is granted to that extent only. In so doing, we reaffirm our original decision in all other respects, and emphasize that we do not consider these factual errors to be material errors or errors as to material facts. Moreover, these corrections do not warrant any change in our original decision, the holding of which was predicated on our find-

[2] We deny that part of NMU's motion which alleges that the Board improperly took administrative notice of certain statistics compiled by the U.S. Department of Commerce, Maritime Administration, and its request that the record be reopened to allow it to offer rebuttal evidence thereto, as lacking in merit. Moreover, we note that although Respondent apparently contends that these sales of vessels were for the purpose of scrapping and not for the purpose of continued operation it acknowledges in its motion that "vessels were sold to an operator who would operate the vessels for one or two voyages" and that "undoubtedly there were some sales during this period of vessels which did have a substantial economic life." Thus, Respondent by its own admissions has conceded, in part, the validity of the statistics of which the Board has taken administrative notice.

ing that upon the sale of a ship, the permanent employees manning her lose their jobs and a new crew is referred through the Union's hiring hall system. However, we have granted the motion to the extent indicated above so that there will be no uncertainty as to the basis for our original finding of a violation and of the facts supporting that finding. Thus, in order to clarify our decision we have hereinafter deleted any and all reference to those facts which are not supported by the record.

Accordingly, the Board's Decision and Order is corrected in the manner set forth in the order herein.

ORDER

IT IS HEREBY ORDERED that the Decision and Order of May 16, 1972, numbered 196 NLRB No. 166, be and it hereby is, corrected by:

Substituting the following for page 6 of the slip opinion of the Decision and Order:

"Thus, because of the unique nature of this industry, virtually all hiring is accomplished through hiring halls located in various ports. An employee is referred to a ship on a permanent basis and retains that position for as long as the Company and the employee desire to continue such employment relationship. However, when a ship is sold, the employees lose their jobs and a new crew is referred through the NMU's hiring hall system.[3] As a practical matter therefore, in the light of this practice, although each ship has a permanent stable work force of employees assigned to it through the hiring hall, whom the Union clearly has a lawful interest in protecting against job loss, the clauses in question in fact *do not* protect those em-

[3] When the vessel *Thalia* was sold by Commerce to an NMU signatory, for example, the Commerce crew left the ship and a new crew was referred from the hiring hall in the new port.

ployees at all in the event of a sale, but instead, as here, serve to preserve those *jobs* for those other seamen who may be eligible for referral through the NMU hiring hall at the port out of which the new owner is to operate. In these circumstances, these clauses place restrictions on sales which are not strictly "germane to the economic integrity of the principal work unit . . ."[4] Instead they only insure that the purchasing employer is under contract with the NMU. Consequently, to conclude that these clauses are lawful would obliterate the distinction between unit" (end of corrected page 6 of slip opinion).

IT IS FURTHER ORDERED that the Decision and Order, as printed, shall appear as hereby corrected.

Dated, Washington, D. C., August 31, 1972.

By direction of the Board:

/s/ GEORGE A. LEET
Associate Executive Secretary

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[4] *Orange Belt District Council of Painters No. 48* [*Calhoun Drywall Co.*] v. *N. L. R. B.*, 328 F.2d 534, 538 (C. A. D. C.).

FILED
MAR 11 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 1225

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

VANTAGE STEAMSHIP CORPORATION; SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC, GULF, LAKES AND INLAND WATERS DISTRICT; SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA,
Intervenors.

BRIEF FOR INTERVENORS SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC, GULF, LAKES AND INLAND WATERS DISTRICT AND SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1973

No. 1225

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

VANTAGE STEAMSHIP CORPORATION; SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC, GULF, LAKES AND INLAND WATERS DISTRICT; SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA,
Intervenors.

BRIEF FOR INTERVENORS SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC, GULF, LAKES AND INLAND WATERS DISTRICT AND SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA IN OPPOSITION

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit dated October 10, 1973, is reported at 486 F.2d 907, and is printed in the Appendix hereto

(3a). The Decision and Order of the National Labor Relations Board, including the opinion of Trial Examiner Thomas A. Ricci, dated May 16, 1972 is reported at 196 NLRB No. 166, and is printed in the Appendix hereto (16a). Orders of the National Labor Relations Board dated May 22, 1972 and August 31, 1972, correcting the Order of May 16, 1972 are printed in the Appendix hereto (46a, 48a). Prior related proceedings are reported as follows: Opinion of the United States Court of Appeals for the Second Circuit, reported at 457 F.2d 1127; reversing Opinion of the United States District Court for the Southern District of New York reported at 329 F.Supp. 151 (S.D. N.Y. 1971).

Jurisdiction

The alleged jurisdictional requisites are set forth in the petition at page 2. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

Question Presented

Whether a labor organization representing employees in the maritime industry violated Section 8(e) of the National Labor Relations Act, 73 Stat. 744, 29 U.S.C. §158(e) by enforcing a provision in its collective bargaining agreement with an employer so as to prevent the employer from selling one of its vessels to another employer unless the latter agreed to assume the collective bargaining agreement and hire its new employees through the labor organization's hiring hall.

Statutes Involved

The relevant statutory provision is the National Labor Relations Act, §8(e), 73 Stat. 544, 29 U.S.C. §158(e). The text of this provision is set forth in the petition at pages 3-4.

Statement of the Case

In 1969 Commerce Tankers Corporation ("Commerce") was engaged in the business of owning and operating two American flag oceangoing or deep-sea tankers, the *S.S. Thalia* and the *S.S. Barbara*. At that time it entered into a 3-year collective bargaining agreement with the National Maritime Union ("NMU"). Although Commerce was not a member of any multi-employer association for bargaining purposes, the contract which it signed was the same as contracts independently entered into by some 48 tanker companies belonging to the Tanker Service Committee, whose representative conducted pattern-setting negotiations with the NMU.

The NMU contract provided, among other things, that if Commerce sold its ships to any American flag shipper (but not a foreign flag shipper) which was not already a signatory to the contract, the ship would be sold with a crew provided by the Union, and further required that Commerce obtain from the purchaser an undertaking that it would abide by all the terms and conditions of the NMU contract.[1]

1. In relevant part, the contract clause at issue is as follows:
Article I, Section 2. Sale and Transfer of Vessels.
(a) The Company agrees with respect to any vessel which is presently under or may hereafter come under this Agreement,

Pursuant to its contract with the NMU, Commerce obtained the unlicensed seamen needed to man its ships through NMU hiring halls located in various ports. Under the hiring hall system seamen seeking work register with the hall for the jobs for which they are qualified, and the time of their registration is recorded. When employers call in job vacancies, these jobs are posted and then bid upon by the registrants. Seamen using the NMU hiring hall are divided into three different groups on the basis of their training and years of service on NMU contracted vessels, no matter who their employers may have been and no matter how many collective bargaining units they were members of. Group I seamen, those with the most experience in any maritime job, are entitled to priority in being dispatched for available jobs. If no Group I seamen bid on a particular job, Group II and then Group III seamen

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that if during the term of this Agreement said vessel is sold or transferred in any manner to any other business entity not covered by this Agreement for operation under United States flag (but not including a vessel which the Company bareboat charters and the charter is terminated), said vessel shall be sold or transferred with the complement of employees who either are or shall be provided by the Union in accordance with the terms of this Agreement, or such number as may be agreed upon between the Union and the transferee. The term "transfer" shall be construed to include any chartering of a vessel by the Company.

(b) The Company obligates itself to obtain for the benefit of the Union a written undertaking with the Union to be executed by the business entity to which the vessel has been sold or transferred that for the full term of the Agreement all of its terms and provisions shall apply to said vessel except as herein-above provided and that said business entity will fully comply with all of the terms and provisions of this Agreement and any amendments thereto to preserve the jobs and job rights of the Unlicensed Personnel covered by this Agreement and to protect and maintain the wages, pension rights and other economic benefits and working conditions provided such personnel under this Agreement.

have an opportunity to bid. Within any particular group, the job goes to the seaman longest out of work who is qualified and bids on the job.

In December 1970, Commerce sold one of its two vessels, the *S.S. Thalia*, to a tanker company which, like Commerce, was signatory to the standard NMU tanker contract. The *S.S. Thalia* was then preparing to sail to India and its crew of permanent employees and temporary replacements was already signed on. At the time of the transfer of ownership, NMU ordered the Commerce employees off the ship and posted 29 permanent jobs for bidding in the hiring hall. Commerce's 29 employees thus lost their rights to their jobs and were required to compete for new assignments with the seamen registered in the NMU hiring hall.

As is illustrated by the above-described events following the sale of the *S.S. Thalia*, the fact that a vessel is sold to an employer who is signatory to an NMU contract in no way assures that the jobs of the employees assigned to the ship are preserved, and on the contrary, in practice the seller's employees lose their existing job rights. The NMU conceded before the Board (and does not contest before this Court) that Article I, Section 2 of its collective bargaining agreement, the contract clause at issue herein, does not preserve the jobs of the particular individuals employed on the vessel being transferred.

On December 23, 1970, shortly after the sale of the *S.S. Thalia*, Commerce agreed to sell its last remaining vessel, the *S.S. Barbara*, to Vantage Steamship Corporation ("Vantage"), a New York corporation which operates six American flag vessels known as "the Vantage group" in

world-wide trade. Vantage and its subsidiary corporations were members of the American Martime Association, a multi-employer association whose employees were represented by the Seafarers International Union (herein "the SIU"), and all the vessels in the Vantage fleet were covered by contracts with the SIU. Over the years the Vantage group would buy and sell vessels and with each vessel purchased, the vessel and the unlicensed crew to man the same would be covered by the SIU contract as part of the Vantage fleet as an accretion under the observed Board rule of fleetwide units, hereinafter discussed.

And so, when Vantage contracted to purchase the *S.S. Barbara* from Commerce, Vantage as purchaser did not assume or undertake, as a condition of such purchase, any obligation to honor or abide by any collective bargaining agreement for unlicensed seamen employees which may have been in effect between the seller Commerce and the NMU representing the unlicensed seamen employees. Indeed, on February 5, 1971, when Commerce and NMU representatives met concerning NMU's insistence that Vantage undertake to assume and honor the NMU collective bargaining agreement for the *S.S. Barbara*, Commerce advised NMU that Vantage informed them that they could not give any such undertaking, as their "fleet" was bound to the SIU contract, and that was how ships sales and purchases operated in the maritime industry, which Commerce further explained to NMU representatives, was its then understanding. NMU did not dispute such understanding, but instead suggested to Commerce that Vantage use a subterfuge; form a separate subsidiary to purchase the *S.S. Barbara* and then give an undertaking, further explaining that there were other companies in the maritime industry that had done this.

In late March 1971, Commerce and NMU representatives met again in an endeavor to resolve the aforesaid issue, so as to permit the *S.S. Barbara* sale and transfer of title to Vantage. Commerce representatives advised the NMU that the possibility of a domestic sale of the *S.S. Barbara* was "virtually impossible" because of deteriorating conditions and that only one or two purchasers were interested, both foreign flag operators: as such, Commerce insisted that NMU had no reason to stop the sale to Vantage, "*because in either event, whether we sold to Vantage, or whether we sold to foreign flags, they [NMU] would lose the jobs.*" It is to be noted that the NMU's aforesaid collective bargaining provision under attack herein is *not* applicable to sales of NMU contracted vessels to foreign flag operators, being limited solely to sales to American flag vessel operators.

In reply to the statement of Commerce's representative (its counsel, Mr. Cohen) Mr. Shannon Wall, NMU's Secretary-Treasurer, stated:

> "* * * he would rather they be lost foreign than be lost to the rival union SIU. He [Wall] was talking in the context of this being a principal [sic], an important principal [sic] to the NMU which they were seeking to uphold.
>
> "Mr. Sovel [NMU's attorney] made the comment that the granting of this dispensation [the aforesaid Commerce request] wouldn't look very good in the proceedings that were then pending."

In concluding his direct testimony as to this March meeting with the NMU representatives, counsel Cohen was asked the following question by the Board's Counsel and gave the answer as follows:

"Q. There is no doubt in your mind, sir, that Mr. Wall made the statement, in words or in substance, that you have just attributed to him, that he would sooner the sale went foreign than see it go to a rival union.

"A. Yes, he said Mr. Nathanson [another Commerce official] and I didn't understand the intense rivalry between the SIU and NMU."

In the meantime, on February 8, the NMU secured an arbitration award restraining Commerce from delivering the *S.S. Barbara* to Vantage or any other purchaser without complying with the ship transfer provisions of the NMU contract, and on March 2, 1971, Judge Frankel of the United States District Court for the Southern District of New York confirmed this award and issued a preliminary injunction.

In the interim, on February 16, Vantage filed a charge with the Board alleging that both the NMU and Commerce were violating Section 8(e) of the Act.

Subsequently the Regional Director of the Board's Second Region sought a Section 10(l) injunction against the NMU and Commerce on the ground that he had reasonable cause to believe that they were violating Section 8(e) of the Act, and on July 15, 1971, Judge Croake of the United States District Court for the Southern District of New York refused to issue such an injunction. *McLeod* v. *National Maritime Union*, 329 F.Supp. 151. In a consolidated appeal, the United States Court of Appeals vacated the injunction issued by Judge Frankel in favor of the NMU and, finding that the Regional Director had reasonable cause to believe that the NMU and Commerce had violated Section

8(e) of the Act, remanded to Judge Croake with instructions that he issue the requested Section 10(l) injunction. *National Maritime Union* v. *Commerce Tankers Corp.*, 457 F.2d 1127 (2nd Cir. 1972).

In the unfair labor practice proceeding, the National Labor Relations Board held that the ship transfer provision of the NMU contract violated Section 8(e) of the Act, *National Maritime Union* (*Commerce Tankers*), 196 NLRB No. 166, rejecting the NMU's defense that the NMU provision had a primary work preservation object. Rather, the Board found that since the clause imposed restrictions on sales which were of no benefit to the Commerce employees, who on sale would be removed from the vessel, similar to the employees on the *Thalia*, the clause was not strictly germane to the economic integrity of the Commerce work unit and was therefore secondary.

On petition for enforcement, the United States Court of Appeals for the Second Circuit, *N.L.R.B.* v. *National Maritime Union*, 486 F.2d 907 (1973), enforced the Board's order finding NMU's violation of Section 8(e) of the Act. NMU's argument was not that the transfer of vessels provision was not an agreement whereby Commerce agreed to cease or refrain from doing business with Vantage or any other company which refused to comply with the terms of agreements of the NMU agreement. Rather, NMU argued solely that its clause fell within "work preservation" as defined and enunciated by this Court in *National Woodwork Manufacturers Assn.* v. *N.L.R.B.*, 386 U.S. 612, 87 S.Ct. 1250, 18 L.Ed. 2d 357 (1967), arguing that the clause intended to benefit all those who were available for employment through the NMU hiring hall, a primary objective.

The Court of Appeals found that this defense was unavailing to NMU, since NMU's motivation was to protect the union's institutional interest rather than the interest of the work unit of Commerce and its members. This was accomplished in order to escape from the Board's rule set forth in *Moore-McCormack Lines, Inc.*, 139 NLRB 796, that upon the sale of a vessel, the purchaser's union mans newly acquired vessels. The NMU clause at issue would require Vantage to assume the NMU contract when under *Moore-McCormack* it was required to man the vessel through the SIU hiring hall. That objective thus was secondary and not protected as primary.

Furthermore, the Court of Appeals found that the NMU's clause was not work-preservative since its practice is to remove all of the seamen from the ship whenever the ship is sold. Finally, the Court refused to accept NMU's argument that the transfer of ship provision is lawful "because prior case law establishes that a contractual provision designed to preserve work for employees in the bargaining unit is valid," stating:

> "While the cases may use the bargaining unit as a yardstick for the permissible scope of a work preservation clause, we are aware of none that do so where, as here, the suggested bargaining unit is many times larger than the actual work force of the primary employer and where the vast majority of the workers in the supposed unit have had no contact at all with the employer. Moreover, as the Board urges, if the NMU's argument were correct, Congress would have had no reason to enact the proviso to section 8(e) which validates union signatory agreements with respect to job site work in the construction industry,

since the hiring hall, upon which NMU's argument is based, is apparently the central source of employment in the construction industry, Teamsters Local 357 v. NLRB, 365 U.S. 667, 672-673, 81 S. Ct. 835, 6 L.Ed.2d 11 (1961), as it is in the maritime industry." (15a; footnote omitted.)

Argument

The issue in the present case is uniquely narrow, affecting solely the maritime industry and the unique rules and decisions which have been developed for the maritime industry. No amount of strained semantics can convert it into a broadly important question of federal law warranting review by this Court on certiorari. As the Court of Appeals for the Second Circuit aptly quoted, the clause at issue introduced "a new twist to Section 8(e) litigation," *The Developing Labor Law* 107 (1971 Supp.), a project of the Section of Labor Relations Law of the American Bar Association (11a). The "new twist" makes this case unique and its holding narrow. The rivalry between two maritime unions, the NMU and SIU, makes this case unique and its holding narrow. The rules governing the maritime industry and the operation of the NMU's hiring hall makes this case unique and its holding narrow. In brief, none of the circumstances governing review on certiorari as set forth in Rule 19 of the Rules of this Court are present. We respectfully submit that there are no special or important reasons for exercising sound judicial discretion in granting the review on writ of certiorari sought herein.

The Court of Appeals found that the NMU violated Section 8(e) of the Act by maintaining and enforcing Article I, Section 2 of the collective bargaining agreement with Commerce so as to prevent Commerce from selling the *S.S.*

Barbara to Vantage. NMU's contention that the Court of Appeals and the National Labor Relations Board erred in invalidating the contract clause in issue rises and falls upon its assertion that the unit employees for which work preservation is sought are not limited to those individuals permanently employed by the Company but includes "all employees" who are eligible to compete for employment with Commerce or any other employer under contract with the NMU through the NMU hiring hall.

The contention, as thus presented, plainly equates "employee" with "potential employee or applicant for employment," and therein lies its fallacy. By seeking to include in the unit any prospective employee, NMU goes far beyond the scope of the work preservation defense postulated by the Supreme Court in *National Woodwork Manufacturers Assn.* v. *N.L.R.B.*, 386 U.S. 612 (1967), and urges that the jobs in question not be protected for the employees involved, but preserved for the NMU generally. This is precisely the type of secondary objective condemned in the Court in *National Woodwork*, *supra*.

In *National Woodwork*, this Court set forth the rationale and concepts underlying Section 8(e) and its concomitant Section 8(b)(4)(i)(ii)(B) and the principles or guidelines to be observed in evaluating whether the agreement or conduct challenged is violative of such subsection.

This Court pointedly held that where an agreement is challenged as being violative of the above subsection, the test is:

> "* * * whether, under all the surrounding circumstances, the Union's objective was preservation of work for [the involved employer's] employees, or whether

> the agreement and boycott were tactically calculated to satisfy union objectives elsewhere." 386 U.S. at 644.

and where "elsewhere," the agreement and/or boycott violates such subsections, 386 U.S. at 644-45. In further elucidation of the rationale underlying the aforesaid subsections, the Court continued at page 645:

> "There need not be an actual dispute with the boycotted employer, * * *, for the activity to fall within this category, so long as the tactical object of the agreement and its maintenance is that employer, or benefits to other than the boycotting employees or other employees of the primary employer thus making the agreement or boycott secondary in its aim. The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees [footnotes omitted]."

In *National Woodwork*, the Court found the agreement protected because the agreement and conduct was,

> "* * * on the [Employer's] jobsite related *solely* to preservation of the traditional tasks of the jobsite [unit employees] carpenters." (at 646, emphasis supplied)

The Court, by its holding aforesaid, affirmed the decisions and rationale of the Board made prior thereto relative to two fundamental tests, to wit: (1) that the *sole* objective of the agreement and conduct must be to preserve unit work for unit employees and (2) that the agreement and conduct must not be tactically calculated to satisfy union objectives elsewhere.

Where an agreement or conduct is to aid a union's members generally, rather than unit employee members of

the bargaining unit, it is union institutional preservation. Such agreement or conduct in the words of the Supreme Court "is tactically calculated to satisfy objectives other than work preservation for unit employees," and as such, is violative of subsection 8(e) and/or 8(b)(4)(B).

Applying the foregoing principles and authorities to the facts at hand, impels the conclusion that the NMU contracted provision in question, Article 1, Section 2(a) and (b) is in contravention of Section 8(e) of the Act.

First, NMU does not dispute the finding of both the Board (20a) and the Court of Appeals (457 F.2d at pages 1134-1137), that the appropriate unit involving the employees of Commerce is a single employer unit and not a multi-employer or industry-wide unit (NMU's Petition, page 10). But the NMU contends that the unit consists of more than those seamen who are on Commerce's payroll, and that the unit includes all persons entitled to utilize the NMU hiring hall. This argument flies in the face of Article I, Section 1 of the NMU-Commerce collective bargaining agreement, which reads, in part, as follows:

> "**Collective Bargaining Agent.** The Company in entering into this Agreement hereby recognizes the Union as the sole collective bargaining agent for the Unlicensed Personnel employed aboard all vessels of the Company where the Company has recognized the Union as such agent. The Company also recognizes the Union as the sole collective bargaining agent for the Unlicensed Personnel employed by the Company on board all U.S. Flag ocean-going vessels including, but not limited to passenger, freighter, dry-cargo, tanker and bulk carriers, which are owned or operated (both

> at present or at any time during the life of this Agreement) by the Company or any of its subsidiaries or affiliates (whether so at present or at any time during the life of this Agreement), except those Companies and vessels already covered by another AFL-CIO Maritime Union, as an owner, as an agent, as a General Agent of the United States, or under bareboat charter."

Thus, the entire unit consists of those persons who are employed by Commerce—not by all other employers who utilize the NMU hiring hall.

Second, the NMU bargains for other separate and distinct units with different employers based and operating on the Great Lakes and for which there are separate and distinct contracts; not for deep sea or oceangoing vessels. The Great Lakes operations, the terms and conditions of employment in such agreements with the NMU, are substantially different from deep sea agreements. Yet the NMU seamen employed by Great Lakes employers are entitled to utilize the NMU hiring hall, despite the fact that they are already employed in entirely different collective bargaining units.

What the NMU apparently argues for is the novel theory that the approximately 30 jobs aboard the vessel *S.S. Barbara* are preserved for all of the approximate 27,000 persons registered in the NMU hiring hall. Since it is hornbook law that the hiring hall must be open to all, we assume that NMU seeks to "preserve jobs" for any and all future thousands who may secure Coast Guard validation papers hereafter and register, pay the NMU service fee and be available. And of course included therein are

the adventurers for a "trip," those having no nexus with the industry, a summer student and legions yet unborn, a result which would clearly frustrate the intent of Congress in enacting Section 8(e) of the Act. In the posture of the facts present herein, a single employer, 30 permanent jobs for permanent employees as provided by the NMU hiring hall, no multi- or industry-wide unit, such concept is most strange. It is clearly institutional preservation for the NMU, for reasons not "germane to the economic integrity of the principal work unit." *District 9, I.A.M.* v. *N.L.R.B.*, 315 F.2d 33, 36 (C.A.D.C. 1962). "Congress has set its face against such * * * agreement." *Ibid.*

We respectfully submit that the Court of Appeals for the Second Circuit was entirely correct in noting the analogy between the law applicable to the case at bar and the established distinction between "union standards" and "union signatory" subcontracting clauses. "The former, which restrict subcontracting to those who observe certain pay scales and conditions of employment, are valid. [Citations omitted.] The latter, which permit unit work to be transferred to other employers only if they are under contract with the union, are usually held illegal. [Citations omitted.]" (11a). The "union signatory" clause obviously is not germane to the economic integrity of the employees in the primary unit, but serves to enhance the union as an institution, to protect its members no matter by whom and where employed. An agreement containing a "union signatory" clause, or a clause such as present at bar, is "tactically calculated to satisfy union objectives elsewhere." *National Woodwork*, 386 U.S. at 644-645.

In essence, the NMU seeks to utilize the clause invalidated by the Board to protect its hiring hall, rather than the jobs of the employees of Commerce. No support for this position is found in any of the cases cited by NMU.

Local 872, International Longshoremen's Association, 163 NLRB 586 (1967) and *Local 1351, Steamship Clerks, etc.* v. *N.L.R.B.*, 329 F.2d 259 (D.C. Cir. 1964), cert. denied, 377 U.S. 993 (cited by NMU on p. 14 of its Petition, footnote 6), are inapposite to the proceedings herein. Those cases are concerned solely with the obligation to conduct a hiring hall in a non-discriminatory manner. It simply does not follow from these cases, as urged by NMU, that a collective bargaining agreement which contains a hiring hall provision creates a relationship between the employer and potential employees who might apply for work through the union hiring hall, sufficient to include them in the unit for the purposes of determining whether, under Section 8(e), some other contractual provision has as its purpose valid primary work preservation or a secondary objective tactically calculated to satisfy union objectives elsewhere.

NMU's reliance on *American Federation of Television and Radio Artists, Westinghouse Broadcasting Co., Inc.,* 160 NLRB 241 (1966) (NMU's Petition, p. 15, fn. 6), is totally misplaced and misleading. In that case, the Board simply held that a work standards provision, valid on its face, could not be found invalid under Section 8(e) because it had the effect of protecting the wage standards of other union members not working for the employer party to the collective bargaining agreement.

In the instant case, however, the clause in question is not a work standards clause, but akin to a union signatory

provision plainly intended to aid the NMU in its rivalry with the SIU rather than protect the work of the Commerce employees. Examination of all the surrounding circumstances makes this clear.

It is unquestioned, that commencing in the 1930's up to the present time, there has been continuous, with occasional short intervening periods, intense institutional union rivalry between the SIU affiliated unions and the NMU. Each organization has sought to expand its institutional and membership interests generally, and for at least upwards of the past fifteen years almost exclusively, at the expense of the other organization. This activity has increasingly heightened over the past period, in proportion to the constant decline of American Merchant Marine and it is undisputed, a matter of official notice, that from a level of transporting approximately 25% of our Nation's imports and exports in the late 1940's, the American Merchant Marine presently transports approximately 5% of such cargo. It is further undisputed that for many years, practically all, if not in fact all, American flag vessels have been unionized with the unions herein involved, representing unlicensed seamen aboard the overwhelming majority of the vessels, the extremely small remaining balance, represented by independent unions.

The maritime industry, consistently and to date, has most substantial sales and transfers of vessels among American Flag operators and with the decline of American Flag vessel operators, increasingly more ship sales and transfers to and among the remaining operators. The SIU and its affiliates, and the NMU, mutually and with-

out Board or Court edict, from 1942 to shortly before the Board's decision in 1962 in *Moore-McCormack Lines, Inc.*, 139 NLRB 796 followed a custom and practice, with some exceptions based upon special circumstances, that whenever a company transferred a vessel, the union having a collective bargaining agreement covering the unlicensed seamen of the purchasing company would have its contract apply, as the vessel would then be part of that company's "fleet-wide unit." *Moore-McCormack, supra*, p. 798, fn. 3.

In 1957 there arose a special circumstance as aforesaid, and SIU petitioned the Board for self-determination elections for each Robin Line vessel under collective bargaining agreement with them, which were sold to Moore-McCormack, the latter having collective bargaining agreements with the NMU. Based upon such special circumstances, the Board after such self-determination election, certified each vessel as separate units. *Moore-McCormack, supra*, at 797.

In 1962, NMU apparently unhappy with the Board's 1957 decision aforesaid, again petitioned the Board, resulting in the 1962 *Moore-McCormack* decision, 139 NLRB 796. The Board laid down the flat rule, a rule thereafter consistently understood and followed by the General Counsel and reaffirmed by the Board, that in the maritime shipping industry, because of the long history, practice and custom, elimination of interunion rivalry, to diminish work stoppages, facilitate transfers and personnel, in other words industrial stability consistent with employee rights, as the unions had made clear by their custom and practice, *that a fleetwide unit is appropriate as the general rule overborne only in a particular case by special circumstances which*

indicate the injustice or unsuitability of such general rule (*Moore-McCormack* at 798-9).

The Board's holding in 1969 in *National Maritime Union of America* (*Overseas Carriers Corporation*), 174 NLRB 216, found accretion to fleetwide units as the law, reaffirmed *Moore-McCormack*, and adopted the Trial Examiner's finding that:

> "The events in this proceeding make evident the validity of the Board's observation in the *Moore-McCormack* case, *supra*, that 'elimination of inter-union rivalry with respect to similar employees of the same employer and a consequent diminution of conflicts which may bring on work stoppages' is one of the considerations pointing to the advantage of a fleetwide unit."

Indeed, the rule of a "fleetwide unit" is the rule that both the NMU and the SIU have lived by. The lack of reported cases may be some indication of the lessening of conflict between these ancient rivals. But even when there was conflict in connection with transfers which were the subject of unfair labor practice charges, the record demonstrates uniform application of the *Moore-McCormack* rule, affirmed by *Overseas Carriers*, *supra*, that where vessels are sold or transferred, they accrete to the fleetwide unit of the purchaser or transferee on authority of *Moore-McCormack*. The foregoing demonstrates the consistent record of the application of the principle enunciated in *Moore-McCormack*, that is, accretion to fleetwide units of the purchaser or transferee.

The foregoing history, particularly post *Moore-McCormack*, as enunciated in *Overseas Carriers*, was intended to

and has brought forth the requisite stability to the industry. Both the NMU and SIU, in order to protect the stabilizing effect of the *Moore-McCormack* rule, inserted into their agreements an all-encompassing recognitional clause to insure that after-acquired vessels would be covered by the agreements and would accrete to the fleetwide unit.

But the NMU was not satisfied. In order to protect an institutional object, preservation of jobs for its members generally, without regard to observance of the rule of law set forth in *Moore-McCormack*, the NMU introduced the clause at issue herein, as well as the continuation of its broad recognition clause, in order that not only would all ships purchased by its companies accrete into the NMU fold, but any of its employers' ships which would be subject to transfer would be also kept within the NMU fold.

It must be clear and certainly must be concluded that an object of NMU's restrictive transfer clause is to frustrate the application of the *Moore-McCormack* doctrine of fleetwide units and accretion thereto as the general rule in the maritime industry. By such object, the clause and its implementation has the secondary intendment and result upon others, neutral employers as in the case at bar, Vantage.

Further evidence of the intendment of the NMU restrictive transfer clause, "tactically calculated to satisfy union objects elsewhere," is found in the limited application of the clause and its implementation, to the facts of life in the maritime industry. It is gainsaid that for all practical purposes, the SIU and the NMU represent the unlicensed seamen in the American Merchant Marine fleet. With this

fact in mind, the NMU still insists that its restrictive transfer clause was intended to preserve the unit work for unit employees.

Upon close scrutiny, it is clear that such was not the sole purpose. On the contrary, under the language of such clause, there is no restriction upon transferring or selling any of the vessels to foreign operators not covered by the United States flag. Many NMU contracted vessels were so sold. There is no requirement for the foreign operator to execute an undertaking as to the seller's collective bargaining agreement, a novation. Certainly not even by the wildest stretch of imagination may one say that there is present "work preservation," within the term as phrased by this Court in *National Woodwork*, to wit, conduct or intendment of the union "related solely to preservation of the traditional task [the work] of job site carpenters" [here seamen aboard the vessel].

Such alleged preservation becomes applicable only when the vessel would be transferred to a SIU contracted employer, the secondary employer, the neutral, at bar Vantage. This is clearly the intendment, its activity and object, "tactically calculated to satisfy NMU objectives elsewhere" —prohibited intendment and conduct.

NMU's clause does not protect all unit work, only that which its rival, the SIU, would be entitled to under the *Moore-McCormack* rule. As far as the NMU clause is concerned, there is no restriction, no work preservation even if its members' entire work, all vessels, are sold to foreign operators. To suggest, let alone contend, that under such

a state of facts, the agreement is primary work preservation and not secondary is, we respectfully submit, to demonstrate a total ignorance of the law applicable in 8(e) cases.

The weakness of NMU's argument is manifested by the palpably inappropriate analogy to job protection of men on lay-off who are required to be recalled before an employer may subcontract work (NMU's Petition, p. 16). Employees on lay-off obviously enjoy contractual rights flowing from a prior employment relationship.

The weakness of NMU's argument is further manifested by its attempt to justify the inclusion of the ship transfer clause, to wit, "to bring * * * most important, stability to the NMU Pension Plan which would suffer impairment if employment by the contract employers were to substantially decline" (NMU's Petition, p. 5). The stability of the NMU Pension Plan is a far cry from "work preservation." Indeed, such a "most important" goal fits neatly into what this Court has proscribed—a clause "tactically calculated to satisfy union objectives elsewhere." *National Woodwork*, 386 U.S. at 644-645.

Finally, the NMU places principal reliance upon the Board's *assumption, without deciding*, that the single employer Commerce unit could include employees who may in the future be referred from NMU hiring halls to work on ships operated by Commerce (NMU's Petition, p. 9; 20a). The NMU interprets that assumption as follows: that the unit represented by the NMU could be deemed to include "those employees entitled to seek employment through the NMU hiring hall" (NMU's Petition, p. 9); but that is

not what the Board said. The Board said solely that it could include those who in the future may be referred from the hiring hall to work on a Commerce ship. The physical presence of such employee on the vessel operated by Commerce is necessary before he can become a member of the collective bargaining unit. The strained expansion of what the Board wrote is indicative of the lack of merit of NMU's Petition.

Cutting through the verbal smokescreen thrown up by NMU, it is crystal clear that NMU, through the provision at bar, is seeking to protect itself as a union, and that protection of the jobs of the Commerce employees affected by the proposed sale of the vessel was not intended. Moreover, it is beyond cavil that acceptance of the arguments urged here by NMU will do substantial violence to the unit principles spelled out by the Board in *Moore-McCormack, supra*, and its progeny.

For all of the foregoing reasons, the decision below is clearly correct. There is no conflict of decision among lower courts. There is no important question of federal law present herein. The facts and issues present herein are so narrow and unique as not to require review by this Court.

Conclusion

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1225

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

VANTAGE STEAMSHIP CORPORATION; SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC, GULF, LAKES AND INLAND WATERS DISTRICT; SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA,
Intervenors.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

This brief is submitted on behalf of the respondent-intervenor, Vantage Steamship Corp., in opposition to the petition for certiorari in the above-referenced matter.

Question Presented for Review

The question presented for review is as stated by the Court of Appeals below (7a):

> "Did the NMU violate section 8(e) of the Act by maintaining and enforcing Article I, section 2 * * * of the NMU-Commerce collective bargaining agreement? Section 8(e) makes it an unfair labor practice for a union and an employer
>
> to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person * * *.
>
> "Article I, section 2, which is entitled 'Sale and Transfer of Vessels,' provides:
>
> (a) The Company agrees with respect to any vessel which is presently under or may hereafter come under this Agreement, that if during the term of this Agreement said vessel is sold or transferred in any manner to any other business entity not covered by this Agreement for operation under United States flag (but not including a vessel which the Company bareboat charters and the charter is terminated), said vessel shall be sold or transferred with the complement of employees who either are or shall be provided by the Union in accordance with the terms of this Agreement, or such number as may be agreed upon between the Union and the transferee. The term 'transfer' shall be construed to include any chartering of a vessel by the Company.
>
> (b) The Company obligates itself to obtain for the benefit of the Union a written undertaking with

the Union to be executed by the business entity to which the vessel has been sold or transferred that for the full term of the Agreement all of its terms and provisions shall apply to said vessel except as hereinabove provided and that said business entity will fully comply with all of the terms and provisions of this Agreement and any amendments thereto to preserve the jobs and job rights of the Unlicensed Personnel covered by this Agreement and to protect and maintain the wages, pension rights and other economic benefits and working conditions provided such personnel under this Agreement."

Statement of the Case

The Petitioners apparently recognize that to state the case is to decide it adversely to their position. Their "Statement" in the Petition is, therefore, so circumlocutious that it obscures the essential and very basic issues that were decided below. The Court of Appeals' presentation of the facts is clear and will be quoted with only such additions as are helpful in understanding points raised by the Petition.

The simple issue is whether Article I, section 2 of a labor agreement between Commerce Tankers Corp. and the National Maritime Union violates the "hot cargo" prohibition of Section 8(e) of the National Labor Relations Act, as amended, 29 U.S.C. §158(e). This section [of the contract] provides in substance that if Commerce sells a ship to an American flag shipper not already under contract with the NMU, the ship will be sold with a crew provided by the NMU, and Commerce will obtain from the purchaser an undertaking to abide by the NMU contract.

At the time of the agreement, Commerce owned two ships and in December 1970 sold one of them, the S.S. Thalia. Since the purchaser was a signatory to the standard NMU contract, no problem of inter-union rivalry arose. It is also important to note that when the "Thalia" was sold all of the crewmembers were discharged from the vessel to be later replaced by a new and entirely different crew.

Shortly after the Commerce's sale of the "Thalia" Commerce agreed to sell its remaining vessel, the S.S. Barbara, to Vantage, which, together with its subsidiaries, operated a number of vessels whose employees were represented by the SIU. Very soon thereafter, both Commerce and Vantage found themselves caught between the competing demands of the two unions and frantic activity ensued in a variety of forums. Under pressure from the NMU, Commerce asked Vantage to give the undertaking required by Article I, section 2. The SIU threatened to strike all the vessels operated by Vantage if it stopped using the SIU hiring hall as the exclusive source of its unlicensed seamen.[1] Vantage understandably refused to accede to the NMU-inspired demand, and threatened to sue Commerce if it did not sell the S.S. Barbara, as it had agreed to do. Similarly, the NMU refused to waive its contractual rights and promptly secured an arbitration award restraining Commerce from delivering the "Barbara" to Vantage without complying with the ship transfer provisions of the NMU contract.

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1. Under the NMU contract, of course, Vantage would have to use the NMU hiring hall.

POINT I

There is no basis for this Court to review the NLRB's determination that the NMU's clause was designed to promote union institutional objectives.

As this Court pointed out in *National Woodwork Manufacturers Ass'n* v. *NLRB,* 386 U.S. 612 (1967), the literal language of Section 8(e) of the National Labor Relations Act is sweeping. However, as a supplement to the preexisting prohibition against union secondary activities under Section 8(b)(4), this Court held that certain exceptions which had been developed under the earlier law should be continued as exceptions to the new ban under §8(e).

In the *National Woodwork* case the Union had won a contract provision under which the employer agreed that it would not handle any doors "which have been fitted prior to being furnished on job." This was to be subject to a test as to (386 U.S. at 645):

> "whether, under all the surrounding circumstances, the Union's objective was preservation of work for [the employer's] employees, or whether the agreements * * * were tactically calculated to satisfying union objectives elsewhere."

The Court ruled that the *Woodwork* contract provision met this test. In evaluating the legitimacy of job preservation objectives this Court compared the Union's conduct in *Allen Bradley Co.* v. *Local 3, Electrical Workers,* 325 U.S. 797 (1945) where "the boycott in *Allen Bradley* was carried on, not as a shield to preserve the jobs of Local 3 members, traditionally a primary labor activity, but as a

sword, to reach out and monopolize all the manufacturing job tasks for Local 3 members." (386 U.S. at 630). That prohibitive objective was exactly the patent and proven goal of the National Maritime Union in the instant case.

Since the *Woodwork* case (and before as part of the development of the law under Section 8(b)(4)) the Board and the Courts have charted a number of clear guidelines as to the difference between prohibited Union aggrandizement and the exception of job preservation.

For instance, as the Court below pointed out, the Board and the Courts worked out a distinction between prohibited "signatory" contracts and permissible "union standards" contracts. The distinction is illustrated in the distinctions drawn with respect to different types of union contract limitations on an employer's right to subcontract. Thus it may be permissible for the parties to prohibit *all* subcontracting since the effect of such prohibition necessarily serves a job preservation purpose. However, a clause which limits subcontracting to only those companies which have labor agreements with a specific union are prohibited. The distinction is that the latter type of clause has objectives beyond the preservation of jobs for employees in the bargaining unit; it serves purposes "elsewhere" and those prohibited purposes are the jurisdictional aspirations of the affected Union. *Painters District Council 48* v. *NLRB*, 117 App. D.C. 233, 328 F.2d 534 (1964); *NLRB* v. *Milk Drivers Local 753*, 392 F.2d 845 (7th Cir. 1968); *NLRB* v. *Teamsters Joint Council 38*, 338 F.2d 23, 28 (9th Cir. 1964); *Meat & Highway Drivers Local 710* v. *NLRB*, 118 U.S. App. D.C. 287, 335 F.2d 709, 717 (1964).

The clause being considered in this case prohibited the transfer of any ship to another employer unless that employer accepted the NMU contract including its union recognition clause. Thus a transfer was not conditioned on the preservation of jobs for the men on the particular vessel but was conditioned, rather, on the recognition by the employer of the NMU as the Union of seamen (whoever they might be) on the vessel in question.

The Board's Determination of the Appropriate Unit

The NMU has tried to avoid the obvious conclusion that it was seeking to preserve or extend its jurisdiction by claiming that the job preservation objective included the jobs and the individuals who might at some time be identified to those jobs through the Union's hiring hall. Since the Union hiring hall embraces all the NMU's members or, more realistically, all those seamen willing to come under the NMU's contracts, the scope of its assertion of job preservation becomes coextensive with the Union's assertion of jurisdiction.

Within the statutory language itself there are two clear indications that there was no Congressional intent to permit maritime unions with hiring halls to force employers to limit their dealings with others so as to preserve the Union's jurisdictional claims.

First, in the so-called "construction industry" proviso to Section 8(e) Congress specifically designated *the single* hiring hall industry to which the strictures of the law would not apply. Despite the hiring hall characteristic of the maritime industry no exception was made for it.

Second, the adoption of the NMU's view would effectively write the prohibition against jurisdictional strikes out of the statute (Section 8(b)(4)(D)) for the maritime industry since every assertion of jurisdiction would simply be equated to an attempt to "preserve" jobs for all of the seamen who, according to the NMU, it *already* represents.

The determination of the scope of the bargaining unit becomes important both in identifying the jobs to be preserved and also in evaluating the union's intent as to the reach of its demands.

It is now well established that the appropriate unit for collective bargaining in the maritime industry is a fleet-wide unit. *Moore-McCormack Lines, Inc.*, 139 N.L.R.B. 796 (1962). Moreover, it was that very landmark decision which eventually prompted the NMU to evolve the clause now in question before this Court. The fleet-wide unit established in *Moore-McCormack* was peculiarly adapted to the conditions in the maritime industry. In essence it provided that upon sale or transfer of a vessel the job opportunities available on board that vessel accreted to the bargaining unit of the transferee. It was decided by the Board that a settled procedure for determining representation and homogeneity of representation within a single fleet would be most likely to stop the bitter jurisdictional conflicts that periodically ravaged the maritime industry. Thus, according to the Board's established policy, if the tables had been turned and *Vantage* had sold a ship to *Commerce*, SIU seamen employed by Vantage would have, in due course left the ship and when *Commerce* began its operation of the vessel it would have relied upon its NMU contract to acquire

new seamen from the NMU hiring hall. The same procedure but with an opposite result would have obtained in the instant case had there been a completed transfer of the "Barbara" from Commerce to Vantage. That is, by application of the *Moore-McCormack* doctrine, the "Barbara" would have, as a matter of law, accreted to the Vantage fleet and come under the labor contract between SIU and Vantage. Indeed, one of the most critical points that must be understood in the present case is that the implementation of the NMU contract clause in conjunction with the application of the Board's bargaining unit rules effectively forestalled any possible transfer of a vessel from an NMU contracted unit to an SIU contracted owner. This necessarily follows since the NLRB has, since 1962, required the acquiring fleet owner to recognize its incumbent union while the NMU contract clause attempts to force recognition of that union as a bargaining representative.

The development of the subject NMU contract clause came shortly after the Board's decision in *National Maritime Union of America* [*Overseas Carrier Corp.*], 174 N.L.R.B. 216 (1969). In that case the Board ruled that a change in the stock ownership interest of the owning corporation resulted in an accretion to the new owners' fleet. As had happened in a number of situations the effect was to move a number of vessels from NMU jurisdiction to SIU jurisdiction. Thus, the timing and the industry background of the development of the NMU contract clause plainly indicate that the simple objective of the NMU was to prevent the transfer of ships from NMU fleets to SIU fleets and to preserve the union's jurisdiction over as many vessels as possible. See also *National Maritime Union of*

North America, AFL-CIO [*Prudential-Grace Lines, Inc.*], 194 N.L.R.B. No. 199 (1972); *McLeod* v. *National Maritime Union of America*, 457 F.2d 40 (2d Cir. 1972).

Of course, the effect of the Board's fleet-wide doctrine was equally applicable to SIU as well as to NMU contracted companies. If the NMU type of contract clause were permitted, it would permit only transfers of SIU vessels to NMU companies. However, the more likely result would be for the SIU to retaliate and insist upon similar clauses in its own labor contracts. The result of that development would be to divide the American Merchant Marine into two separate components and eliminate the possibility of any sales or transfer between SIU and NMU contracted companies. The Board has recognized that such a stagnation in the transferability of vessels would be contrary to the public interest and one need not belabor the obnoxious quality of such a result.

The NMU contract clause is limited to United States flag operations. If the objective was simply to preserve job opportunity, the NMU would have insisted upon a flat prohibition of such foreign flag transfers. The contract language even provides that the number of employees serving under the United States flag shall be so many "as may be agreed upon between the union and the transferee" (A. 18). The concern, therefore, is not for the *number* of jobs, but for the identity of the union which is going to "cut the deal."

Furthermore, the record in this case contains uncontradicted testimony concerning statements by the NMU's

Secretary-Treasurer as to the anti-SIU objective of the contract clause. The following is an excerpt from testimony by Commerce's Assistant Secretary, D. David Cohen, concerning his dealings with the NMU:

> "Q. When you pointed out to the NMU that the jobs would be lost in either event, if you sold foreign or if they permitted the sale to be made to Vantage, did Mr. Wall make any comment? A. Yes, he did.
>
> "Q. What did Mr. Wall say? A. He said they would rather be lost—
>
> "Q. Speak up, sir. A. *He said he would rather they be lost foreign than be lost to the rival union SIU.* He was talking in the context of this being a principle, an important principle to the NMU which they were seeking to uphold.
>
> "Mr. Sovel made the comment that the granting of this dispensation wouldn't look very good in the proceedings that were then pending.
>
> "Q. There is no doubt in your mind, sir, that Mr. Wall made the statement, in words or in substance, that you have just attributed to him, that he would sooner the sale went foreign than see it go to a rival union? A. Yes, *he said Mr. Nathanson and I didn't understand the intense rivalry between the SIU and NMU.*" [Emphasis supplied.]

The NLRB has determined that for the purposes of effective bargaining the appropriate bargaining unit in the maritime industry is a fleet-wide unit. Such a unit is of course smaller than an industrywide unit and still smaller than a unit comprised of all individuals who might use the NMU hiring hall which is the unit NMU contends it is entitled to protect. The record plainly establishes that the NMU clause was not intended to protect and does not in fact protect the positions of those individuals actually serving on board the vessel as witnessed by the dis-

charge of the seamen on board the "Thalia." Both the Board and the Trial Examiner recognized that the appropriate unit for job preservation purposes "is the single employer unit and not a multi-employer or industrywide unit" (20a). Of course, as the Board goes on to point out, that single employer unit may at any single point of time, given the hiring hall practices of the industry and the indefinite duration of maritime employment, include different employees referred from NMU hiring halls. However, this possibility of reexamining the identity of the individuals *actually* serving in the vessel at various points in time does not equate with the patently defective NMU contract clause whose asserted purpose is to "preserve" the jobs of an *infinite* number of seamen co-extensive with its own possible membership. To state the union's position is to explain it in terms of the preservation of its own jurisdiction rather than preservation of jobs as contemplated in the *Woodwork* case. Thus, the Board reached the determination that regardless of what might happen in the future, the only jobs that might properly be subject to a claim of job preservation would be those "of the employees covered by the contract in the event of a sale." This necessarily means employees of the seller himself and not possible employees or individuals who might be employed by the buyer.

The National Labor Relations Board, as confirmed by the Court below, has made a determination as to the appropriate unit which may be considered for job preservation purposes as an exception to the general prohibitions in Section 8(e). That determination has been made by the Board on logical, rational grounds in a decision which takes

into particular account the special circumstances in the maritime industry and the rules for the regulation of industrial relations in that industry as they have been developed by the Board since at least 1962. The decision is correct by any standard, it is consistent with the judicial decisions which have passed upon similar questions, and it is a decision peculiarly within the competence of the Board, *NLRB* v. *S.E. Nichols-Dover, Inc.*, 414 F.2d 561 (3d Cir. 1969), cert. denied, 397 U.S. 916 (1970); *NLRB* v. *The Lord Baltimore Press, Inc.*, 370 F.2d 397 (8th Cir. 1966). Moreover, against the background of this particular industry and the experience that the Board has had with it in the instant case and in the many situations which have involved the intense rivalry between the two major maritime unions, the Board has made a determination that the *objective* of the NMU clause went beyond permissible job preservation purposes and reached out in an effort to control the labor relations of others. That, again, is a decision peculiarly within the competence of the National Labor Relations Board. *NLRB* v. *Denver Building and Construction Council*, 341 U.S. 657 (1951).

Conclusion

For the foregoing reasons, we respectfully submit that the decision of the National Labor Relations Board as confirmed by the Court of Appeals should not be disturbed and that it would be inappropriate to grant the instant Petition for Certiorari.

Respectfully submitted,

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Vantage Steamship Corp.

No. 73-1225

APR 8 19

MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1973

NATIONAL MARITIME UNION OF AMERICA,
AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-15a) is reported at 486 F. 2d 907. The Board's decision and order (Pet. App. 16a-24a), as amended (Pet. App. 46a-51a), are reported at 196 NLRB 1100.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on November 12, 1973. The petition for a writ of certiorari was filed on February 11, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly concluded that the union violated Section 8(e) of the National Labor Relations Act by maintaining and enforcing a contract clause providing that, if a ship is sold to a company not under contract with the union, it must carry with it a crew provided by the union and the seller must obtain a commitment from the purchaser to abide by the union's contract.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. 3-4.

STATEMENT

A. The Board's Findings of Fact

In 1969, Commerce Tankers Corporation ("Commerce"), which owned and operated two American flag oceangoing tankers, the *S.S. Thalia* and the *S.S. Barbara*, entered into a 3-year collective bargaining agreement with the National Maritime Union ("NMU") (A. 3-4; 38-40, 69, 128, 131).[1] Although Commerce was not a member of any multi-employer association for bargaining purposes, the contract which it signed was the same as contracts independently entered into by 48 different tanker companies belonging to the Tanker Service Committee, whose representative conducted pattern-setting negotiations with the NMU (A. 4; 131, 40-44, 50-53, 87-89, 104-105).

Pursuant to its contract with NMU, Commerce obtained the unlicensed seamen needed to man its ships

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[1] "A." refers to the appendix, and "S.A." to the supplemental appendix, filed in the court of appeals.

through the NMU hiring halls located in various ports (A. 44). Under the hiring hall system, seamen seeking work register with the hall for the jobs for which they are qualified, and the time of their registration is recorded. When employers call in job vacancies, these jobs are posted and then bid upon by the registrants who desire them.

Seamen using the NMU hall are divided into three different groups on the basis of their training and years of service on NMU contract vessels. Group I seamen, those with the most experience, are entitled to priority in being dispatched for available jobs. If no Group I seamen bid on a particular job, Group II and then Group III seamen have an opportunity to bid. Within any particular group, the job goes to the seaman longest out of work who is qualified and bids on the job. (A. 98-99.)

Jobs posted in the hiring hall are classified either as permanent, or relief, assignments. Permanent assignments, for which only Group I seamen are eligible, are indefinite in duration, so that a Group I seaman assigned to such a job may stay with the vessel for as long as he and his employer mutually desire. A permanent employee has the right not only to reship following the completion of any voyage, but also to take leaves of absence for holidays, illness, or other acceptable reasons, and, when he gives up his job, he is eligible for severance pay. (A. 118-121, 99-101, 44-45, 47-49.) If a permanent employee fails to reship on consecutive voyages and his absence is not authorized or otherwise excused, he loses his permanent status and his job goes back to the hiring hall for bidding (A. 121, 47-49). To get another job, the seaman must re-register with the hall; his priority then is below all those in his classification whose time stamp indicates that they have been out of work longer (A. 119, 98).

Commerce's contract with the NMU required that, if Commerce sold any of its ships to an American flag operator not already signatory to an NMU contract, the ship would be sold with a crew provided by the NMU and Commerce would obtain from the purchaser an undertaking that it would abide by all the terms and conditions of the NMU contract (A. 4, 18-19; 129). In December 1970, Commerce sold the *Thalia* to a company which, like Commerce, was signatory to the standard NMU tanker contract. The *Thalia* was then preparing to sail to India and its crew of permanent employees and temporary replacements was already signed on. At the time of the transfer of ownership, however, the NMU ordered the Commerce employees off the ship and posted the 29 permanent jobs for bidding in the hiring hall. Commerce's 29 permanent employees thus lost their rights to their jobs and were required to compete for new permanent assignments with the Group I seamen registered in the hall. (A. 44-46.)[2]

On December 23, 1970, shortly after the sale of the *S.S. Thalia,* Commerce agreed to sell its last remaining vessel, the *S.S. Barbara*, to Vantage Steamship Corporation, a New York corporation which operates American flag vessels known as "the Vantage group" in worldwide trade (A. 4; 55-56, 61-62). Vantage and its subsidiary corporations were members of the American Maritime Association, a multi-employer association whose employees were represented by the Seafarers International Union ("SIU"), and all the vessels in the Vantage fleet were covered by contracts with the SIU (A. 56-60). Vantage was not a signatory to NMU's standard tanker

---

[2]The NMU conceded, before the Board, that the ship sale clause did not protect the particular individuals who were employed on the vessel at the time of transfer (A. 127).

agreement and Commerce's sales contract with Vantage made no provision for compliance with the NMU ship sale clause, which required that Commerce obtain an undertaking to honor the NMU agreement (A. 4; 62).

On January 11, 1971, after the NMU learned that Commerce was contemplating sale of the *S.S. Barbara,* it wrote Commerce and demanded to know what steps were being taken to assure compliance with the NMU ship sale clause (A. 129-130, 131-132). Although Commerce initially indicated that it foresaw no compliance problems (A. 130, 131-132), it subsequently advised the NMU that, on February 4, 1971, Vantage gave notice that it would be unable to recognize the NMU or give any undertaking to abide by the NMU's standard tanker agreement (A. 71-72). Commerce inquired whether the NMU would waive the ship sale clause, but the NMU refused (A. 72-74).

On February 6, 1971, Commerce advised Vantage that, unless it gave the undertaking required by the NMU ship sale clause, Commerce might be unable to transfer the *Barbara* (A. 5; 132). On February 8, Vantage responded that it stood ready, willing, and able to perform its part of its bargain with Commerce (which, as indicated, contained no requirement that Vantage comply with the NMU ship sale clause), and that it would hold Commerce accountable for the damages it would suffer if Commerce failed to perform its obligations (A. 133). On the same day, however, the NMU secured an arbitration award restraining Commerce from delivering the *Barbara* to Vantage or any other purchaser without complying with the ship transfer provisions of the NMU contract, and, on March 2, 1971, the United States District Court for the Southern District of New York confirmed this award and issued a

preliminary injunction. 325 F. Supp. 360. (A. 4-5, 11-12; 131-132, 145-151.)

Meanwhile, Vantage filed a charge with the Board alleging that both the NMU and Commerce were violating Section 8(e) of the Act (A. 5, 16; 1). The Board's Regional Director petitioned the district court, pursuant to Section 10(*l*) of the Act, for a preliminary injunction, which was denied. 329 F. Supp. 151. On appeal, the court below reversed both the denial of the 10(*l*) injunction and the earlier arbitration award. 457 F. 2d 1127.

B. The Decisions Below

The Board held that NMU and Commerce violated Section 8(e) of the Act by maintaining and enforcing the NMU ship sale clause so as to prevent Commerce from selling the *S.S. Barbara* to Vantage. The Board rejected the NMU's defense that the clause was lawful because it merely served to protect the jobs of the employees covered by the contract. The Board found that the clause did not protect the ship's permanent employees upon a sale, but instead preserved their jobs "for those other seamen who may be eligible for referral through the NMU hiring hall at the port out of which the new owner is to operate." The Board concluded that, in these circumstances, the clause placed "restrictions on sales which are not strictly 'germane to the economic integrity of the principal work unit'," and therefore it constituted restraint of a secondary employer (Pet. App. 50a-51a.) The Board ordered the NMU and Commerce to cease and desist from the unlawful conduct and to post appropriate notices (Pet. App. 21a-24a).[3]

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[3]Commerce has complied with this order and did not contest it in the court below.

The court of appeals sustained the Board's findings and conclusions, and enforced its order (Pet. App. 3a-15a).

ARGUMENT

The decision of the court of appeals sustaining the Board's finding that the NMU's ship sale clause violated Section 8(e) of the Act, which generally prohibits a contract between a union and an employer requiring the latter not to do business with others, is correct and not in conflict with other decisions. No issue warranting review by this Court is presented.

1. In *National Woodwork Mfrs. Ass'n* v. *National Labor Relations Board*, 386 U.S. 612, 644, this Court held that whether an agreement restricting business relations with another violates Section 8(e) of the Act turns on whether, under all the surrounding circumstances, "the Union's objective was preservation of work for [the contracting employer's] employees," or "to satisfy union objectives elsewhere." If the agreement has the former objective, it is primary and lawful; if it has the latter objective, it is secondary and unlawful. Thus, "union standards" clauses which restrict subcontracting to those who observe certain pay scales and conditions of employment are reasonably calculated to prevent the transfer of unit work to competing employers with lower labor costs and, accordingly, have been treated as primary and lawful. See *Painters District Council 48* v. *National Labor Relations Board*, 328 F. 2d 534 (C.A.D.C.). On the other hand, "union signatory" clauses which permit the transfer of unit work to any employer so long as he is under a contract with the union have been treated as secondary and unlawful, since they represent an agreement to boycott other persons "for reasons not strictly germane to the eco-

nomic integrity of the principal work unit." *District 9, I.A.M.* v. *National Labor Relations Board*, 315 F. 2d 33, 36 (C.A.D.C.).

2. The Board and the court of appeals properly concluded that the NMU ship sale clause operated like a "union signatory" clause and thus violated Section 8(e). The clause on its face permits the sale of a ship to American purchasers only if they are signatories to a NMU contract. Moreover, as the NMU conceded before the Board (A. 127), in its practical operation the ship sale clause does nothing to protect the jobs of the seamen actually employed by the seller at the time of transfer. On the contrary, as shown *supra*, p. 4, when a ship is sold, the employees on board lose their jobs and the beneficiaries of the clause's operation are those other seamen, relative strangers to the seller and the ship, who may be referred to the new owner from the NMU's hiring halls. In any realistic sense, then, the NMU's ship sale clause does not preserve work for the employees of the boycotting employer, here Commerce, but, like a union signatory clause, only insures that the purchasing employer is under contract with the NMU and that the NMU membership as a whole does not suffer as a result of the transfer.[4]

Indeed, the record shows that the real reason for NMU's enforcement of its ship sale clause against Commerce was not to preserve unit work but to strike a blow

[4]The facts of this case are in marked contrast to those in *National Woodwork*, *supra*, where the clause at issue protected the current employees of the boycotting employer against the transfer of their work to anyone, including their fellow union members; thus, unlike the present case, the result of the clause's enforcement there was that the current employees continued to perform their traditional bargaining unit work (386 U.S. at 615-616, 644-646).

against its rival, the SIU. According to undisputed testimony (A. 155-156, n. 3; 75-77), Commerce, near the end of March 1971, asked the NMU for an exemption from the ship sale clause on the ground that, aside from Vantage, no other domestic companies were interested in purchasing the *Barbara*, and that thus, if the sale to Vantage did not go through, the ship would have to be sold to foreign operators. Pointing out that whether the ship was sold to Vantage, a SIU-contract operator, or to a foreign operator, the loss of the unit jobs was in any event inevitable, Commerce argued that there was no reason for the NMU to prevent the sale to Vantage. The NMU did not dispute Commerce's premise that the destruction of the Commerce bargaining unit was inevitable, but still insisted on its contract rights, stating that it would rather that the jobs "be lost foreign" than "be lost to the rival union SIU" (A. 77).

3. Noting that the Board assumed, without deciding, that the relevant bargaining unit "could include employees who may in the future be referred from NMU hiring halls to work on ships operated by Commerce" (Pet. App. 20a), the NMU contends that a clause protecting all seamen "eligible to seek employment through the NMU hiring halls" (Pet. 13)—some 21,000 in number (S.A. 1)—merely protects the bargaining unit, and thus is lawful (Pet. 13-17).[5] As the court below properly recognized (Pet. App. 15a), however, it would obliterate

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[5]In the proceedings below, the NMU initially argued that the relevant bargaining unit was a multi-employer unit which included not just the employees of Commerce, but also the employees of all the tanker companies under contract with the NMU. However, the Administrative Law Judge rejected this multi-employer unit contention (Pet. App. 37a-39a), and the NMU thereafter abandoned it.

the distinction between unit work preservation and union signatory clauses, and nullify the congressional purpose in enacting Section 8(e), to sanction protection where the unit is "many times larger than the actual work force of the primary employer and where the vast majority of the workers in the supposed unit have had no contact at all with the employer."

Finally, the NMU errs in asserting that the decision below holds that "the Union could seek job preservation *only* for those employees actually employed aboard a ship at the time of sale" (Pet. 9, italics in original), and in suggesting that the sole vice in the ship sale clause was that it benefited seamen eligible to seek employment, but not actually employed, by Commerce (Pet. 9, 15-16). A valid work preservation clause, of course, protects not only those persons who are actually employed by the employer, but it also has the incidental effect of benefiting laid-off employees who hope to return and those unknown persons who may be hired to work in the bargaining unit in the future. However, the NMU ship sale clause does nothing to prevent the actual employees of the boycotting employer from losing their jobs; hence the benefits which it secures to other union members—the merely prospective employees—are not "incidental," but the chief object of the clause.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MICHAEL RODAK, JR., CLERK

IN THE

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October Term 1973

No. 1225

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Petitioner,

v.

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Respondent,

and

VANTAGE STEAMSHIP CORPORATION; SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC, GULF, LAKES AND INLAND WATERS DISTRICTS; SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA,

Intervenors.

REPLY TO BRIEFS IN OPPOSITION

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Intervenors.

REPLY TO BRIEFS IN OPPOSITION

1. The Brief in Opposition submitted on behalf of the National Labor Relations Board contains a fundamental misconception of the manner in which the hiring hall in the maritime industry operates, a misconception which goes to the heart of the Board's erroneous disposition of the case. Counsel for the Board states, at Page 8 of the Board's Brief in Opposition, that Article 1, Section 2 of the NMU Deep Sea Tanker collective bargaining agreement operates like a union signatory clause in that it assures only that the NMU membership "as a whole" does not suffer as a result of a transfer. This simply is not so!

The unit of employees protected by Article 1, Section 2 of the NMU Deep Sea Tanker collective bargaining agreement consists of those employees entitled *by the contract* to seek employment aboard the employer's (in this case Commerce's) vessels through the hiring halls established by the collective bargaining agreement. This unit consists of both union and *non-union* members and, in point of fact, referral for employment through the hiring hall is not and could not be limited to union members, *Local 872 International Longshoreman's Association*, 163 NLRB 586 (1967); *Local 1351, Steamship Clerks, etc.* v. *NLRB*, 329 F.2d 259 (D.C. Cir. 1964), *cert. denied*, 377 U.S. 993. In addition, there are many members of the NMU who are *not* part of the bargaining unit protected by Article 1, Section 2. For example, the NMU has numerous collective bargaining agreements with companies operating on the inland rivers and lakes. These collective bargaining agreements contain separate hiring hall provisions, and the employees working under these agreements receive *no* protection from Article 1, Section 2 of the NMU Deep Sea Tanker collective bargaining agreement. The NMU also represents government seamen as well as many employees in non-maritime fields who were not in the Commerce bargaining unit and received no protection from Article 1, Section 2. In short, it is a basic and fundamental error to equate NMU membership with those employees entitled to seek employment through the hiring halls established by the NMU Tanker collective bargaining agreebent, first, because the membership of the NMU is much larger than the unit of employees covered by the tanker collective bargaining agreement, and, second, because the unit covered by the collective bargaining agreement includes individuals who are *not* members of the union. Thus, Article 1, Section 2 does not operate as a union signatory clause and does not operate to protect the jobs of the NMU membership "as a whole."

2. Counsel for the NLRB and the Intervenors try to attribute anti-SIU *animus* as being the basic purpose for the adoption of Article 1, Section 2 of the NMU Tanker collective bargaining agreement. The evidence is directly to the contrary. No finding of any anti-SIU *animus* was made by the Board, nor did such alleged *animus* play any part in the Board's decision. The testimony cited in the Briefs in Opposition as supporting this claim of anti-SIU *animus* occurred at the hearing before Judge Croake on the Regional Director's application for a Section 10(l) injunction. Judge Croake rejected any claim of anti-SIU *animus* as follows, *McLeod* v. *National Maritime Union of America*, 329 F. Supp. 151, at 157-158 (SDNY 1971):

> "Turning to the particular facts, the Court concludes that on this record the motivation of the NMU in negotiating and enforcing the collective bargaining agreement with Commerce, and with the other tanker operators as well, *was to preserve as many of the declining number of jobs as possible for NMU seamen.* Its paramount desire was the traditional and valid one of protection of the 'job pool' and the Pension Plan and other elements of job security of its members in the face of increasing automation. *It does not appear to have had the objective of supplanting SIU in whole or in part as bargaining agent with Vantage.* Nor was there any other dispute between NMU and Vantage upon which motivation for secondary activities could be predicated." (Emphasis supplied)

The testimony relied upon in the Briefs in Opposition that NMU would rather see the jobs go foreign than to SIU is quoted completely out of context. It arose in the following manner. Mr. D. David Cohen, Corporate Counsel for Vernitron Corporation, Commerce's parent company, testified that he had a meeting with Mr. Shannon Wall, then Secretary-Treasurer of the National Maritime

Union, at which Mr. Wall allegedly stated that he would rather see the ship go foreign than be lost to SIU. This was not a complete statement of what was said to Mr. Cohen at that meeting. Rather, the point being made by Mr. Wall was that the basic trade of United States flag tankers is the American coastwise trade which is restricted to United States flag vessels. Since foreign vessels cannot compete for this trade, should an American coastwise tanker be sold foreign it will no longer be competing for the American coastwise trade. In such circumstances the cargo formerly handled by the vessel will be picked up by another American vessel, possibly one with an NMU crew. Thus, where a tanker is sold foreign it may *not* result in any loss of jobs to NMU seamen. However, where a vessel is sold to an SIU company engaged in American coastwise trade, then the loss of the jobs to the NMU bargaining unit is a certainty. It was in this context that the statement attributed to Mr. Wall was made, a fact that Mr. Cohen was forced to concede on cross-examination as follows (a 77-a 78):

> " * * * When it came to the question of the point that you were posing to the union, that you would reduce the jobs anyway if the Barbara did not operate, do you recall that was pointed out to you if the jobs are lost on the Barbara that there is a good possibility that some other NMU company could pick them up? A. Yes, definitely did say that.
>
> Q. Are you now aware since becoming involved in this particular litigation that the Barbara as an American Flag tanker was eligible to operate in the American coastwise trade? A. Yes.
>
> Q. Whereas a foreign tanker could not. A. Yes.
>
> Q. So that the sale to foreign could still possibly leave the sailing to NMU seamen? A. Yes, I think we even discussed at that meeting just as an example that if the vessel was sold foreign that the

American business that would be left could be competed for by both NMU and SIU seamen.

Q. By the remaining American companies? A. By the remaining American companies."

The foregoing also explains why the NMU was less concerned about applying Article 1, Section 2 to a foreign sale than it was about applying it to a domestic sale. There were a number of reasons why Article 1, Section 2 was not made applicable to foreign transfers. First, the provisions of Article 1, Section 2 could not feasibly be applied to a foreign flag vessel because a foreign flag ship might not stop in United States ports where it could be serviced by the Union. Second, foreign law frequently prohibits unions of countries other than that of the flag of the ship from representing employees on that ship. Third, this Court has held, and recently has reaffirmed, the principle that the National Labor Act does not apply to foreign flag ships. *McCulloch* v. *Sociedad Nacional, Etc.*, 372 U.S. 10 (1963), *Windward Shipping (London), Ltd.* v. *American Radio Ass'n.*, U.S. , 94 S.Ct. 959 (1974). Thus, for all these reasons, it was impracticable to seek to apply Article 1, Section 2 to a foreign transfer, and the failure to so apply it was not due to any lack of desire by NMU not to seek protection of the jobs of unit employees where a ship was sold foreign, nor does it support the claim that the adoption of Article 1, Section 2 was motivated by an anti-SIU *animus*.

3. Counsel for the Intervenors argue that this Court should hold that Article 1, Section 2 is invalid because it is in conflict with the fleetwide principle applicable to defining bargaining units in the maritime industry. The short answer to this argument is that it was not the basis on which the Board decided the case. In fact, the Board specifically found the arguments relating to the application of the fleetwide principle were "not germane" to its decision (21 a). The reason why this argument with respect to the fleetwide

principle is "not germane" was initially pointed out by Judge Frankel as follows:

> "Finally, to give the subject more than it deserves, the intervenor seems mistaken in its apparent premise that rules defining appropriate bargaining units may or should be read to outlaw work preservation agreements."

Trial examiner, Thomas A. Ricci, disposed of this claim as follows:

> "But this mistaken reliance upon *Moore-McCormack* falls short of condemning Article 1, Section 2 of the NMU contract for an additional reason. If the purchaser had been a newly formed company, or one that had never operated seagoing tankers, would the restrictive clause be deemed proper? *It is difficult to see how the fortuitous circumstances of a particular purchaser could serve to make an otherwise lawful contract illegal.*" (37a.) (Emphasis supplied)

4. Finally, counsel for Intervenor SIU argues that this Court should deny certiorari because the decision below is "uniquely narrow." Notwithstanding counsel's constant repetition of this phrase, there is nothing "uniquely narrow" about the Board's decision. The Board did not decide the case on basis applicable only to the maritime industry; rather, the impact of the decisions below will have effect on all industries where the hiring is through hiring halls. The effect of the decisions below is to make it impossible for any union which represents a unit of employees who are hired through a hiring hall to seek job preservation for those unit employees. Thus, it is not in any sense a "narrow" decision; rather, it will affect many workers and a wide variety of industries, and, since it represents a substantial departure from this Court's prior decision in *National Woodwork Manufacturers Association* v. *NLRB*, 386 U.S. 612 (1967), it raises issues of the utmost importance which require review by this Court.

CONCLUSION

For all the foregoing reasons it is respectfully submitted that the petition should be granted.

Respectfully submitted,

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